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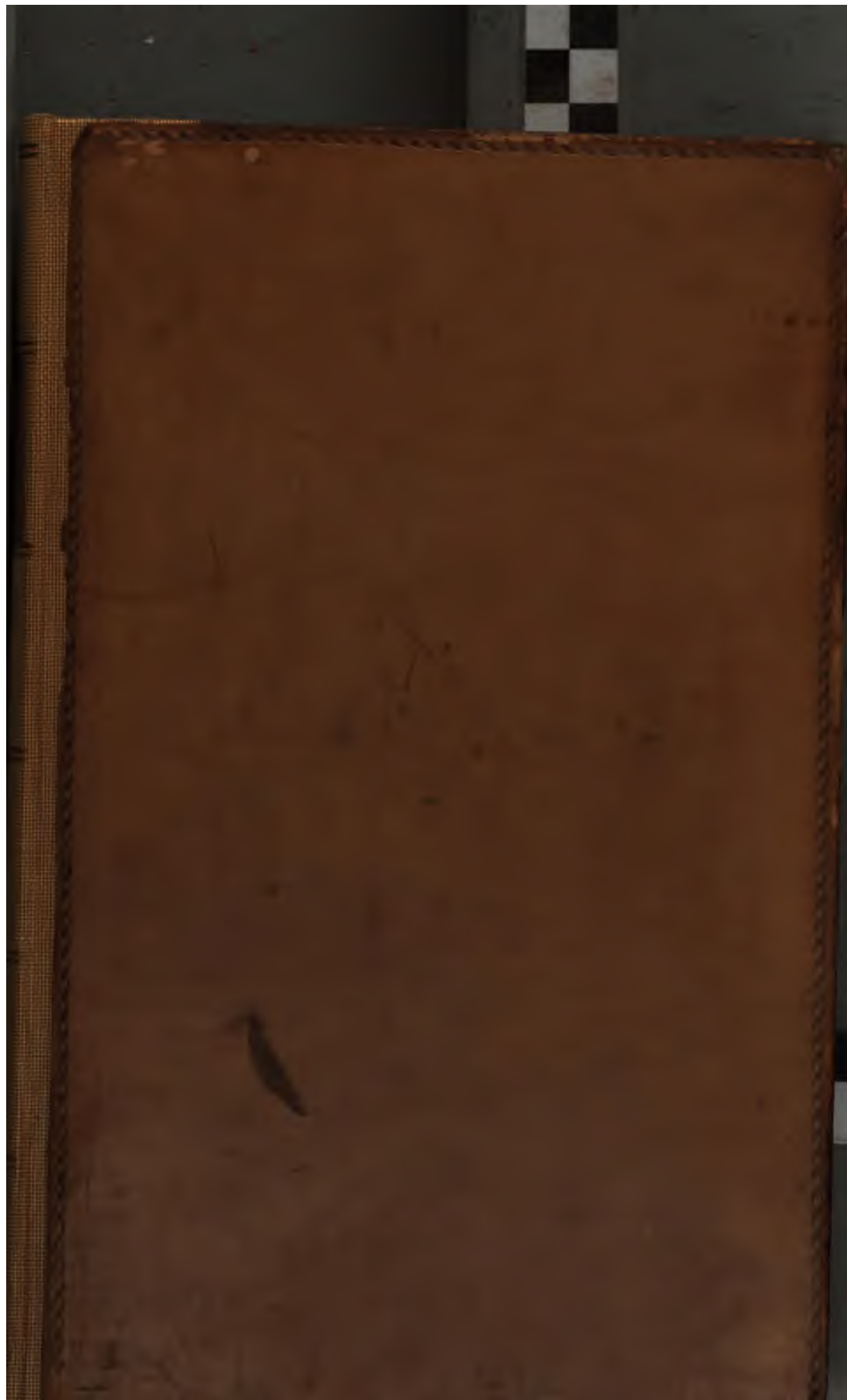
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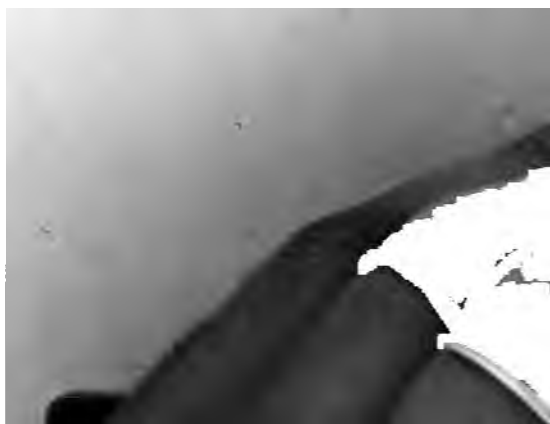
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REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
*HIGH COURT OF ADMIRALTY;*

COMMENCING WITH THE  
JUDGMENTS  
OF  
*THE RIGHT HON. SIR WILLIAM SCOTT,*  
Michaelmas Term 1798.

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By CHR. ROBINSON, LL.D. ADVOCATE.

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VOLUME THE FOURTH.

LONDON:  
PRINTED BY A. STRAHAN,  
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,  
FOR J. BUTTERWORTH, AND FOR J. WHITE, FLEET-STREET.

1812.



## ADVERTISEMENT.

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**I**N order to effect the purpose of *comprehending the remaining cases of the last war within the fourth volume*, it was found necessary to increase the size of the eighth Part, and also to defer the publication somewhat later than would otherwise have taken place.

Doctors' Commons,  
Feb. 24, 1804.

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Argo, Smith,	6th May	1802	-	Affirmed.
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Cape of Good Hope,	24th May	1802	-	Affirmed.
Columbia, Weeks,	12th Aug.	1801	-	Affirmed.
Conqueror, Tate,	29th March	1803	-	Affirmed.
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as to the Cargo				
—, as to the	} -	-	-	Reversed.
Restitution of				
the Ship -				
Perseverance,	10th Aug.	1803	-	Affirmed.
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(a) Rosalia and Betty,	6th May	1802	-	Affirmed.
Sufa, Hufsey,	19th March	1803	-	Affirmed.

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BEFORE THE JUDGES' DELEGATE,

IN CAUSES CIVIL AND MARITIME.

Betty, Cathcart,	1st July	1800	-	Affirmed.
William Beckford,	24th Nov.	1801	-	Affirmed.

(a) Affirmed in principle by the Rosalia, and the Elizabeth, *Roper*, 6th May, 1802, in which the Lords of Appeal held, that the carrying contraband outwards with false papers would affect the *returned* cargo with condemnation.





# ERRATA.

Page.	Line.
6	6, <i>for</i> that will in itself, <i>read</i> , <i>that</i> will in itself.
8	23, <i>for</i> lightening, <i>read</i> lightning.
9	10, <i>for</i> were expected, <i>read</i> was expected.
21	8, after the words not imported, insert a comma.
21	9, after the word importation, dele comma.
32	2, from the bottom, <i>for</i> claimant's, <i>read</i> the claimant's.
41	16, after the word course, instead of a semicolon use a comma.
57	1, after the word vessel, instead of a semicolon use a full point.
70	margin, <i>for</i> The Principe, <i>read</i> The Principe Athaelante.
82	8 & 9, <i>for</i> prosecu-cution, <i>read</i> prose-cution.
91	15, <i>for</i> had, <i>read</i> has.
105	25, after the word treaties dele semicolon.
124	6, <i>for</i> captor, <i>read</i> captors.
134	26, <i>for</i> are not protected, <i>read</i> is not protected.
158	24, <i>for</i> in foreign port, <i>read</i> in a foreign port.

The Reader is requested to correct, by this Table, an erratum in No. 12. of the Admiralty Reports:—

Appendix, page 4. line 11, *for* continuance, *read* discontinuance.



**R E P O R T S**  
OF  
**C A S E S**  
DETERMINED IN THE  
**HIGH COURT OF ADMIRALTY,**  
&c. &c. &c.

**DATE OF HOSTILITIES.**

	Order of Reprisals against FRANCE, 11th February, 1793.
	HOLLAND, 15th September, 1795.
	SPAIN, 9th November, 1796.
	the LIGURIAN and ROMAN Republics, 28th August, 1798.

**PEACE.**

The ratification of the preliminaries of peace were exchanged between  
ENGLAND and FRANCE, 10th October, 1801.

**THE BARBARA, CHEGWIN Master.**

*July 1st,*  
1801.

(Instance Court.)

**I**N this case a hypothecation bond had been given, 23d May, 1801, in *Jersey*, by the Master (a), who was also the owner of the vessel, for the necessary repairs and outfit of the ship: The bond covenanted for the payment of the money, three months after date, on the arrival of the ship in *London*, either by bills or good security.

Hypothecation bond, by the owner a British subject, "of *London*," in *Jersey*. Warrant granted.

(a) The bond described the owner as *J. Chegwin*, of *London*, master and owner of the brig *Barbara of Jersey*, now lying in the river of *Jersey*, and bound to *London*.

The  
BARBARA.

July 1st,  
1801.

The plaintiffs having applied without success for the payment of the money or other security, *Swabey* moved the Court to grant a warrant to arrest the ship in case of bottomree, on a suggestion that the ship was on the eve of being transferred to other persons, and was preparing to proceed to sea.

It was said in support of the motion, that the cases respecting *domestic* bonds in which prohibition had been granted, had been chiefly concerning bonds given by the master *solely as master*; that there was nothing to prevent an *owner* from fitting out his ship in this manner, in a case in which, described as of *London*, he had become owner in a distant port, and was in want of funds to navigate her home; that *Jersey* for the purpose of sustaining these bonds, might be considered as a foreign possession.

Warrant granted.

Jan. 12th,  
1802.

[In the same Case.]

(Instance Court.)

Monition  
against persons  
retaining the  
register of a  
ship, directed  
to be sold un-  
der a decree of  
the Court.

ON a subsequent day when the Marshal was proceeding to execute the decree for sale, it appeared that the register was not forthcoming, but that it was detained in the possession of *W. S*—— under a sale, pretended to have been made to him by the original owner, to defeat the effect of the bottomree bond; *Swabey* moved the Court on this suggestion, that a monition might issue against *W. S*—— the asserted purchaser, to bring in the ship's register. The Court at first doubted whether this was an usual monition.

*Swabey*

*Swabey.*—It is the daily practice in causes of possession, to issue monitions to bring in the registers.

The  
BARBARA.

Jan. 12th,  
1802.

*Court.*—It is so; but here the party stands on a former sale.

*Swabey.*—The seizure was made almost immediately on the ship's arrival in port. If there has been any sale, it must have been fraudulent to defeat this bond; without the register, the ship will not sell for half its value.

Monition granted.

To this monition *S*—— made a return, that the register had been by him deposited in the hands of *W. V.*

A monition was in consequence prayed, and directed to issue against *W. V.* to the same effect; on which the register was delivered up.

THE HELENA, HESLOP Master.

July 1st,  
1801.

(Instance Court.)

**T**HIS was a case of a *British* ship, which had been taken, on a voyage from *Saffee* to *Lisbon*, by an *Algerine* corsair, and sold by the dey of *Algiers* to a merchant of *Minorca*, and by him sold, on the surrender of the island of *Minorca* to the *British* arms, to the present holder, a merchant of *London*. On coming into the port of *London*, a warrant had been applied for to arrest this ship on the part of the former

Capture and sale of an *English* ship by *Algerines*.—Suit of former owners suggesting the conversion to have been *invalid* under such a capture, as a *piratical seizure*; suit not sustained.

The  
HELENA.

July 1st,  
1801.

*British* proprietor ; but the Court refused a warrant, and directed a monition to issue, calling on the possessor to shew cause, why she should not be restored to the former *British* owner.

*The King's Advocate and Sewell on the part of the former proprietors*—contended that the seizure by the *Algerine corsair* was not a *lawful capture*, converting the property; that the purchaser, under such an act of forcible possession, could derive no title to detain the ship against the demand of the original proprietor.

*On the other side, Lawrence and Robinson.*

JUDGMENT.

Sir *W. Scott*.—This is a question arising on a ship, which has been purchased by a *British* merchant of a *Spaniard*: A claim is now given on the part of the original *British* proprietor, on a suggestion that the vessel, while sailing as his property, was captured and carried into the *Barbary States*, and there sold to the *Spanish* merchant, from whom the present holder purchased. It is certainly true, as it has been argued on the part of the present possessor, that the Court is disposed to pay particular respect to derivative titles, when fairly possessed ; and it does this on the plain and general ground, that there must be a sequel of transactions, continued in a course of time, which shall be held conclusive, to cure antecedent defects, and to give security to the title of a *bonâ fide* purchaser. On this foundation all property rests ; with respect to moveables, the period is very short for that effect. It is true, that ships pass by formal instruments, and written documents, and therefore

therefore do not come entirely under the rules that apply to the transfer of moveable property; but still they are entitled to the equity of similar considerations to a certain degree, particularly where positive regulations have not intervened to exclude them. This ship appears to have been taken by the *Algerines*; and it is argued, that the *Algerines* are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. Certain it is, that the *African* States were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states. So long ago, as the time of *Charles 2d*, *Molloy* speaks of them in language, which, though sufficiently quaint, expresses the true character in which they were considered in his time.—“ *Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places: for though they acknowledge the supremacy of the Port, yet all the power of it cannot impose on them more than their own wills voluntarily consent to. The famous Carthage having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers, till the knowing Cato gave council for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, who now what open hostility denied, by thieving and piracy continue; as stinking elders spring from those places where noble oaks have been felled; and in their art are become such masters, and*  
to .

The  
HELENA.

July, 1st  
1801.



The  
HELENA.

July 1st,  
1801.

*to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet it is great in mischief: the consideration of which put fire into the breast of the aged Lewis IX. to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it; whereupon a council of war being called, the question was, whether the same should be summoned, and carried, it should not; for it was not fit the solemn ceremonies of war should be lavished away on a company of thieves and pirates. Notwithstanding this, Tunis and Tripoli, and their Sister Algier, do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates) yet having acquired the reputation of a government, they cannot properly be esteemed pirates, but enemies."* Molloy, p. 33. sect. iv.

Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to *the mode* of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly *in their way*, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the *Spanish* purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty;

treaty ; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this Court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction, as legalizing the act. The transfer appears, besides, to have been passed in a solemn manner before the public officer of the *Spanish* government, the *Spanish* consul ; and in the subsequent instance, the property is again transferred to the present possessor, under the public sanction of the Judge of the Vice-Admiralty Court of *Minorca*.

Under these circumstances, I think it is now much too late for this Court to interfere for the purpose of annulling these several acts of transfer, which appear to have been made, in both instances, with perfect good faith on the part of the several purchasers, and for an equivalent consideration. Without considering at all the question, what rule would have been applied to the case of a *bonâ fide* purchase from a piratical captor, I shall dismiss the party, and decree the ship to be delivered to the *British* purchaser.

Party dismissed.

The  
HELENA.

July 1st,  
1801.

July 8th,  
1801.

THE COSMOPOLITE, MATHISON Master.

Licence to  
trade with the  
enemy, in cer-  
tain articles,—  
in what re-  
spect the use  
ought to con-  
form to the  
letter, &c.

**T**HIS was a case respecting a licence, granted to a *British* merchant, to import certain specified articles from *Spain*. It appeared, that the licence had been originally granted for three months *from the date of the instrument*, but that it had afterwards been altered to *three months from the date of the bill of lading*.

*On the part of the Captors, the King's Advocate.—*

There are two objections to the manner in which this licence has been used; the first is, that although the terms of the licence are specific, as to the nature of the articles which were to be imported, '*Spanish wool, cochineal, dying wood, and barilla,*' under this permission, articles of a very different description have been imported; for, besides these articles, there is a quantity of wines (a) and hides. These goods, at least, must be subject to condemnation, since they are not amongst the enumerated articles, neither are there any general words in the licence by which they can be protected. The other objection is of a more serious nature. The licence was obtained in *July 1799*, and as it is admitted, originally *for three months*, yet protection is now claimed under it for a shipment made in 1801. In explanation of this manifest irregularity, it is said, that the jealousy of the *Spanish* government threw so many difficulties in the way of shipments of this nature, that it became necessary to use the greatest secrecy, and to extend the time; and therefore an alteration was obtained at the council office *for three months after the bill of lading*; but by what

(a) 10 pipes of  
wine, 98 hides.

what authority this was done is not stated. It is not a slight clerical alteration, but an alteration of the essential part of the licence. The effect of granting a licence is totally destroyed by it; a licence for three months is, by these means, converted into a perpetual licence, by which the party may protect several successive shipments till he is detected. The legal effect of this instrument is totally destroyed by the manner of using it, and the consequence will be, that these goods will be subject to condemnation, as the property of *British* subjects taken in trade with the enemy.

The  
COSMOPOLITE.

July 8th,  
1801.

*On the part of the Claimant, Laurence.*—It is undoubtedly a case very proper to be brought before the Court, that some explanation may be given of the variation between the original licence and the instrument as it is now produced, to operate on this shipment. The conduct of the parties through the whole of this business is free from all imputation: no fraudulent purpose, nor any intentional abuse of this authority, can be charged upon them. It is stated in the affidavit, that the alteration as to time was made at the council office; the fair presumption is, that it was done by the authority of the council—

[*Court.*—Do the Council alter any instrument to which the king's sign manual has been affixed? From the experience that I have had of their mode of proceedings, I am not led to suppose that to be the practice.]

*Counsel.*—The presumption would still go higher, that the application had been communicated to his Majesty. If the Court is not satisfied with the authenticity of this instrument in its present form, it will allow the  
matter

The  
COSMOPOLITE.

July 8th,  
1801.

matter to stand over, that it may be again submitted to his Majesty ; and that an application may be made for another licence to operate on this shipment *ab initio*. As to the articles that are not exactly conformable to the enumeration, they are not to be considered as a material departure from the terms of the licence, being but a small quantity, only about ten pipes of wine, and ninety-eight hides, out of a cargo of between two and three hundred tons.

#### JUDGMENT.

Sir *W. Scott*.—This case arises on the construction of a licence granted to import from *Teneriffe*, during a war with *Spain*, goods of a specified description. It is perfectly well known, that by war all communication between the subjects of the belligerent countries must be suspended, and that no intercourse (a) can

---

(a) The principle of restraining the subjects of a country, from carrying on commercial intercourse with the enemies of the state, seems to be as strongly fortified as any rule of law can be, by *reason* and practice. In respect to the propriety and political necessity of the measure, almost all the elementary writers on the law of nations concur in the same opinion. *Ex natura belli (says Bynkershoek), commercia inter hostes cessare, non est dubitandum ; quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones belli satis declarant.*

With respect to the general practice of *European* states *Boerius*, in his decisions, records the concurrent testimony of several states, and in opposition to some distinctions and qualifications, which had been suggested by particular lawyers, maintains, ‘ *Ego tamen contrarium credo, quod non licet, tam licitas, quam illicitas hostibus deferre, tempore guerræ ;*’ and he declares this to be the general opinion of Jurists. In the ancient practice of the Court of Admiralty,

can legally be carried on between the subjects of the hostile states, but by the special licence of their respective governments. Under this view of the matter, it is clear, that a licence is an high act of sovereignty, an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controuled. Licences being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried farther than the intention of the great authority, which grants them, may be supposed to extend. I do not say that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate the fair effect of them. An excess in the *quantity* of goods permitted, might not be considered as noxious to any extent. A variation in the *quality* or *substance* of the goods might be more significant, because a liberty assumed of importing one species of goods, under a licence granted to import another, might lead to very dangerous abuses. In several cases of licences, this Court has had occasion to observe, that articles have been introduced which might interfere with our own manufacturers, not merely raw materials for the necessary employment of the skill and labour of *British* artisans, but the finished productions of foreign industry and art, which might

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miralty, we find it laid down.—‘Item, soit enquis de tous ceux, qui entrecommunent, vendent, ou achatent, avec aucuns des ennemis de Messieur le Roi *sans licence* espediale du Roi, ou de son admiral.’—*Bl. B.* p. 76.

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come in competition with those of our own ; and it has observed, not without surprise, that some licences themselves, I mean particularly those *Irish* ones which appeared in the case of the *Christina Sophia* (a), have given a countenance to this practice. Where the licences have expressly permitted the introduction of such goods, this Court cannot take upon itself to withhold from the individual the benefit of such licences, however obtained ; but it will always consider it to be its duty to look to the licence, for the enumeration of the goods, that are to be protected by it. In the present case it appears, that the terms of the licence have not been followed in this respect ; here is a licence for barilla, wool, liquorice, orchilla wood, and dying wood, yet there are other articles, a considerable quantity of wine, and some hides, on board. It is said, that these, comparatively with the burthen of the vessel, form but a very trifling part of the cargo. Be the quantity what it may, it ought to have been provided for in the enumeration, which the merchant submitted to the discretion of government, when he applied for his licence. As it now stands, I must consider this part of the cargo as totally denuded of any authority under the licence, and therefore subject to condemnation. Another material circumstance in all licences, is the limitation of time, in which they are to be carried into effect ; for as it is within the view of government, in granting these licences, to combine all commercial and political considerations, a communication with the enemy might be

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(a) *June 20, 1801.*—The terms of the licence were general “for articles for manufacture-use and agriculture,” articles imported, “tobacco pipes, thread, bobbin, long holland, geneva, hops, &c.”  
very

very proper at one time, and, at another, very unfit and highly mischievous. It might be highly proper in 1799, and highly inexpedient in 1801. Time therefore appears to be a very important ingredient; if the party takes upon himself to extend the term of the licence in this respect, it would be, in my opinion, *licentia non sumpta pudenter*.

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Two circumstances are required to give the due effect to a licence: first, That the intention of the grantor shall be pursued; and, secondly, That there shall be an entire *bona fides* on the part of the user. It has been contended, that the latter alone should be sufficient, and that a construction of the grant merely erroneous, should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential, that that only shall be done which the grantor intended to permit; whatever he did not mean to permit is absolutely interdicted, and the party who uses the licence engages not only for fair intentions, but for an accurate interpretation and execution; when I say an accurate interpretation and execution, I do not mean to exclude such a latitude, as may be supposed to conform to the intentions of the grantor, liberally understood.

The present licence was first granted in 1799, for three months: At that time, as it stood, when coming out of the hands of the Sovereign of this Country, and countersigned by the Secretary of State, it was a perfectly good licence, for the articles enumerated, and for the time therein specified. But I find a difficulty in holding that a licence, so granted, is a good licence for an importation in 1801. It appears on the face of the instrument that there has been an erasure, and that the words 'three months' have been altered

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to 'three months from the date of the bill of lading,' extending it, not to this year, or to any other year, but to a time indefinite, whenever it might suit the convenience of the merchant to make use of it.

The question then is, Whether the account given of this alteration is satisfactory? It may be so, as to one constituent part of a licence, and not as to another; it may be satisfactory as to the *bona fides* of the party obtaining it, but not as to its conformity with the intention of the grantor; and I have already said, that it ought to combine both these properties. The affidavit states, "that the licence was originally made out for three months from the date of the said licence; but upon its being represented at the council office by this deponent's said house, that owing to the jealousy of the *Spanish* government, and the difficulty of communication with the said island of *Teneriffe*, and the secrecy necessary to be observed, the lives and property of the persons at *Teneriffe* being endangered by carrying on a trade with this country, if discovered, the said licence was altered at the council office, to continue in force for three months from the date of the bills of lading."

Now it appears to me, that this representation is not entirely satisfactory. As to exportation from *Teneriffe*, and other parts of *Spain*, we have seen so many instances of it in neutral ships, that it is not very easy to understand how it could be exposed to so much jealousy on the part of the *Spanish* government, in the manner here described; or if it were so, how happened it that this was a secret at the time of making the application? How came a licence to be taken restricted to three months, if it was known that  
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it could be carried into effect only by watching an opportunity of getting into *Teneriffe*, as it were by stealth, and by getting out in the same manner? If this fact had been mentioned, no doubt proper means would have been taken to provide for it, under the very liberal attention which is, on all occasions, paid by government to the representation of merchants: If it was not known till afterwards, application should have been made, in the same manner as for the original licence, to the secretary of state, who countersigned the first instrument; whereas the affidavit only states, 'that an application was made to the council office,' without mentioning *when*, or by whom, this alteration is supposed to have been made. From any observations of mine on the proceedings of the Council, I find a difficulty in supposing that any persons who compose that board would take upon themselves to alter a licence that had been sanctioned by the sign manual. Besides, how is it authenticated? The word of an inferior clerk of the council cannot be received as a sufficient authentication; all instruments of this sort should be certified in some manner, by the authority of the Council. It is too much for this Court to take it upon inferior authority, or on the mere representation of the party himself. After the alteration, the party carries it to the custom house (a), and there it is deposited,

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(a) The affidavit stated, "that in *December* following the licence was deposited in the custom house, in order that the customs might have notice of any cargo being imported *under* it. That in *February* long before the knowledge of the capture, the deponent applied to the custom house to indorse the name of the ship on the licence; that a doubt was then expressed on the part of the custom house,

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deposited, and filed, as a thing not immediately to be put in use; when it comes to be examined, this erasure is perceived, and the custom office refuse to act upon it, and insist, that before it shall be considered as an efficient licence, it shall be resigned. On this information, as the affidavit states, 'the party sent his clerk to the council office to get it resigned,' the more prudent measure would have been for the merchant to have applied himself to some person there of a more efficient character. It seems, however, that a clerk in the Council Office told the merchant's clerk, that nothing could be done in the business on account of the then existing embargo, as the vessel was a *Swedish* ship; in this answer, the party imprudently acquiesced, and here the matter rested.

On this statement of the facts, I do not feel myself warranted to say, that I can be satisfied with the authority of this licence; I think I shall administer the safest justice by referring the party to another Court, composed of members of the privy council, who are best capable of judging of the sufficiency of the authority, under which the alteration was made, and of the validity of the licence so altered, applied as it has been to the present transaction.

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house, whether in consequence of the alteration, as to the time of the importation, they could with propriety act upon it? That the matter being referred to the board, and the same doubts being entertained by them, the licence was returned to the deponent, that it might be *resigned* by the Secretary of State, or *renewed*; that one of the clerks of the deponent was sent to make application to this effect, who addressing himself to Mr. E. S——, one of the clerks of the council office, was informed by him, that nothing could be done, owing to the embargo which had lately taken place on *Danish* and *Swedish* ships, &c."

THE

THE WERLDSBORGAREN, LAGERHOLM  
Master.

July 8th,  
1801.

**T**HIS was a case of a *Swedish* ship brought in under the embargo, on a voyage from *Philadelphia* to *Lisbon*: when it became necessary to unliver the cargo, which was claimed for merchants of *Lisbon*. Application was now made on the part of the ship, (which was restored when the embargo was taken off), that the Court would pronounce the freight to be due.

Freight, demanded by a ship under embargo, against a cargo, not under the embargo, but unloaded, to be sent on by another conveyance.—not given.

*Court*—In this case the cargo is claimed for persons not subject to the embargo. The ship was brought in as a *Swedish* ship, and on that account only the detention has been occasioned, without any co-operation on the part of the cargo. The cargo has been brought out of its course, and has been detained on account of the ship, and is finally compelled to find another vehicle to convey it to its market. Under such circumstances, I think it is not liable to the demand of freight.

THE NARCISSUS, MOULTON Master.

July 14th,  
1801.

**T**HIS was a case, on objection to charges made on an *American* cargo, that had been restored. It was a cargo taken on a voyage from *Demerara* to *New York*, *July 1795*, previous to the declaration of hostilities against *Holland*, and carried to *Bermuda*, where the Judge of the Vice-Admiralty Court (a), restored the ship and part of the cargo; but entertaining suspicions of the bulk of the cargo, that, it was *Dutch* property, he directed it to be sent home to *Europe*, to be put into the hands of the commissioners,

Cargoesent from Bermuda into the hands of the Dutch Commissioners: expences of sending to Europe, not chargeable on the claimant, obtaining restitution.

(a) Decree at Bermuda, 11th Sept. 1795, cargo brought to England, in Jan. 1796.

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who had been appointed for the management of *Dutch* property, under the Stat. 35 G. 3. c. 80. § 21.

On the part of the *American* claimant, who had since obtained restitution of the goods, *Swabey* objected to the charge of insurance, and other expences of bringing the goods to *England*, as charges that were not incurred by the claimant, nor for his benefit.

JUDGMENT.

Sir *W. Scott*.—This was the case of a ship and goods taken on a voyage from *Demerara* to *New York*, and carried into *Bermuda*, at a time when it was doubtful what would be the state of public affairs between this country and *Holland*, and after an act of parliament had passed for the custody of all *Dutch* property, found in the ports of this kingdom. They were carried into *Bermuda*, where the judge restored the ship, and part of the cargo; but detained the remainder on suspicions, which have since turned out to be unfounded. Considering the act of parliament to apply to this property, he directed it to be sent to *England*, to be put into the hands of the *Dutch* commissioners. They received it under a notion, that their authority extended to the care of all *Dutch* property brought into this country after the war, which construction of their power later opinions have held not to be correct (*b*). As hostilities had then actually commenced, this acceptance of the property on their part, cannot be considered as done in literal pursuance of

(*b*) Prohibition prayed on the part of the *Dutch* Commissioners against Lord *Keith*, proceeding in the Court of Admiralty, on ships seized at the *Cape of Good Hope*, before the proclamation for reprisals, but brought into this kingdom after the proclamation.—Prohibition refused. Cited in *Luccena v. Craufurd*, 3 *Fuller and Bos. Reports*, p. 82.

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the act, but was done with fair intentions and for the purpose of managing the property to the best advantage, for those who might finally be entitled. But as they have taken it into their own possession, the Court has held, that they are liable to the claimants, to whom restitution may be decreed, in the place of the actual captors whom they have divested. The merchant whose goods were seized, had a right under the general law of nations, to an adjudication of his property, in the country where it was carried: the property has been conveyed to *Europe*, under an application of a novel policy, framed for the particular convenience of the *British* government: I think that the expence of that transmission, and every expence that was intended to render it secure, must fall upon the party for whose convenience this was done, and that the neutral claimant should be protected therefrom. I impute no impropriety of conduct to any person; the Judge acted for the best in directing the property to be conveyed, and the commissioners acted for the best in accepting and disposing of it; but the claimants are no parties to this act of conveyance, and are not liable to the charges that have attended it.

I shall therefore refer it, under the general observations that I have stated, to the registrar and merchants, to deduct these charges: desiring them at the same time to advert to what would have been the value of this cargo in *New York*.—If it should appear by the sale, that the value has been considerably increased by selling it in an *European* market, it would not be equitable, that the claimant should at the same time reap the benefit of an improved sale, and refuse to bear any of the expences attending its

conveyance to a better market. Under these principles I shall refer it to the registrar, and merchants.

June 15th,  
1802.

(*In the same Case.*)

Farther objections to the registrar's report in this case.

**A** FARTHER question was brought before the Court on a subsequent day, on objection to the Registrar's report.

Dr. *Swabey* stated the circumstances of the capture in 1795, and the order of the Judge of *Bermuda* for sending this property to *England*, to be put into the hands of the *Dutch* commissioners, and objected to the report made by the registrar and merchants, that it had allowed against the claimant freight and insurance in the voyage to *Europe*.

*On this point it was contended,* That the freight and insurance could not be deemed to be made for the security of the claimant; that when he was brought into the vice-admiralty court of *Bermuda*, he had a right to expect a sentence there, and that the subsequent transmission of the property to *Europe*, could not be considered as done in any manner for his benefit. It was farther objected, that there was a deficiency in the quantity of the cargo; that of one hundred and twenty hogsheads of sugar landed at *Bermuda*, only eighty had been shipped for *London*, or had come into the hands of the *Dutch* commissioners; that of the remaining forty, the report had allowed only for twenty-nine hogsheads acknowledged to have been sold at *Bermuda*; that eleven hogsheads were missing, without an account; that twenty-nine had been sold in *Bermuda*, by the captor, for the purpose of defraying the expences incurred there, and the expence of transmitting the cargo to *Europe*. It was prayed,

prayed, that the twenty-nine sold at *Bermuda*, and the eleven, of which no account was rendered, might be accounted for at the price at which the remainder of the cargo was sold in *England*; and that other deficiencies of weight, might be made good at the same valuation.

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*On the other side, the King's Advocate and Arnold.*—The part which was sold in *Bermuda* was sold not merely to defray the expences incurred there, but to discharge the demand of freight from *Demerara* to *New York*, to which the *American* vessel was entitled. The *Dutch* commissioners have not had in their possession more than eighty casks; they have had no opportunity of communication with the private captor, and cannot be answerable for more than has come to their hands. If the claimant has any further demands, they must be prosecuted *against the captor*. The freight was not deducted, in this estimate, because the registrar and merchants found that the increase of price here was greatly beyond what would have been obtained at *Bermuda*; they thought it, therefore, reasonable, that the charge of bringing it to such a beneficial market should be defrayed by the cargo.

*Swabey.*—The compensation was directed to be paid at the prices at *New York*.

*Arnold.*—The value at *Bermuda* is all the claimant would have obtained, if the cargo had been sold there. The whole report has proceeded on equitable grounds, putting the claimant on a better footing than if the cargo had been sold at *Bermuda*, and therefore laying some of the expences attending that benefit on the cargo.

*Court.*



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Narcissa.*

*June 15th,  
1808.*

*Court.*—The report does not state on what principle the registrar and merchants proceeded ; it is only said, in the act, “That they did as they have done, finding the price obtained in *England* so much greater ;” Am I to understand that to be the case ?

*Mr. Winthrop, one of the merchants, present in Court.*—We endeavoured to take all the circumstances into our consideration ; we have considered what the parties themselves appear to have expected would be the probable amount in *America* ; but still we did not rest on that circumstance as conclusive, nor as the sole ground on which our estimate was to be made ; we have, on the whole, allowed something more than we conceive the goods would have sold for at *New York*, deducting the expences of that voyage.

#### JUDGMENT.

*Sir W. Scott.*—These cases are to be considered in a different manner from ordinary cases of prize, inasmuch as the question arises, on a course of management, to which they have been subject, rather under particular domestic regulations of our own, than under the general law of nations. Circumstances may make it necessary, on particular occasions, that property should be put under a custody not recognized by the general principles of that law ; when this happens, the Court will always be disposed to treat property so placed, with every practicable indulgence, so as to provide for the full indemnification of the neutral merchant, if it turns out that he obtains a final restitution. In sending this cargo to *Europe*, to be put into the hands of the *Dutch* commissioners, the Judge acted with caution, and not improperly ; but in consequence of that decree, additional expences

pences have been incurred ; and the question for the consideration of the Court is, Who shall be held responsible for them ? It is undeniable that this disposition was made for the accommodation of the *British* government. Under the general practice of the law of nations, the claimant might have insisted that the goods should not be taken out of the Court of *Bermuda* without a decision : but they were transmitted to this country ; and in being referred to *Europe* to prosecute his claims, instead of having them brought to adjudication on the spot, the extreme rights of the neutral claimant may have been a little compromised. But it is said, that he has eventually derived considerable benefit from that very circumstance : If so, equity would revolt at the pretension, that he should enjoy this advantage, without bearing, at the same time, some of the expences attending it. Taking it to be, as stated in the report, that the party *has* derived a profit from this transmission of the cargo to *Europe*, I am of opinion that a share of the expences are properly charged to him.

On the other part of the case, respecting the deficiency, I think the claimant is entitled to his entire indemnity against the commissioners. According to the ordinary practice of prize proceedings, he might have demanded it against the captor at *Bermuda* ; but he is told, ' No ; these goods must be put into the ' hands of other trustees, and for the accommodation ' of the *British* government.' That being the case, it does, I think, justify a demand against government for a restitution of the whole cargo ; and although the commissioners may not have had possession of that part, still it would not be a becoming thing to send the claimant to make his demand against the original

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original captors. The commissioners enjoy the confidence of government, and possess the power of adjusting these claims. If there has been any embezzlement in *Bermuda*, government has the power of bringing that matter to account. The party has been pronounced to have a right to the restitution of the whole cargo; government has taken from him his obvious natural remedy against the captors, for it dispossessed the captors, and took the property into its own hands, taking it, according to my apprehension, with all the responsibility of the original captors, as to the quantum of restitution, if restitution should be finally decreed. It would be a most dishonouring injustice to tell the neutral merchant, who has had his goods brought from *Bermuda* without his consent, and put into the hands of 'the commissioners, that he must go back again to *Bermuda*, and institute a fresh suit against the captors, for deficiencies in the restitution made by the commissioners.

Mr. *Winthrop*.—I am afraid that I have been misunderstood: I meant to state, that the report has allowed the full amount of what would have been received for the *whole* cargo, if it had arrived at *New York*.

Court.—I think the party is entitled to the benefit of the *whole* of his claim, as upon a sale in *London*.

Report referred back to the registrar and merchants.

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*Note*.—The report has since been amended, but has not yet been brought before the Court. In the amended report, the registrar and merchants conclude after observing upon weights, and the different manner in which the goods had been repacked, &c. "that there was no reason to suspect any embezzlement or deduction of any part of the cargo; that the deficiency was not greater than might be expected from wastage and drainage, considering the length of time, and all the circumstances of the case."

THE

## THE JOSEPHINE, Fish Master.

July 14th,  
1801.

**T**HIS was a question respecting the right of property in twenty-eight ingots of silver, that had been taken on a voyage from *France* to *Hamburgh*, and claimed on behalf of Mr. *Ingraham* of *America*, although documented in the ship's papers, as going for the account of Mr. *Gelston*, a person resident in *France*.

Silver, consigned by an enemy's shipper to his agent in *Hamburgh*, for the purpose of answering drafts of a correspondent in *America*, without any letter of advice, or document, putting it out of his controul—considered as the property of the shipper.

The case now came on to be heard on *farther* proof.

*On the part of the claimant Arnold* contended, that the silver was to be considered as the property of Mr. *Ingraham*, and as being the proceeds of a cargo of provisions, sent from *America* to *France*, and there put into the hands of Mr. *Skipwith*, who was the person giving orders for the shipment of the silver.

*On the other side it was contended.*—That the silver did not appear to be shipped, in consequence of any orders from Mr. *Ingraham*; nor in conformity to any advice sent to him of the shipment; that it was going to *Hamburgh* to be placed in the hands of Mr. *Skipwith's* agent, and was to be considered as *Skipwith's* property.

## JUDGMENT.

Sir *W. Scott*.—This case is stated to have originated in the following manner: A cargo of provisions being the property of Mr. *Ingraham* of *New York*, is said to have come from *America* to *France*, on board of the brig *Peggy*, consigned to Mr. *Gelston*, another *American*, who appears to have been a young man lately settled in *France*.

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There can be no doubt that such a transaction did take place ; the instructions to Mr. *Gelston* are produced, directing him to “ dispose of the brig on certain terms, and to remit the proceeds of the cargo to *America*, or to load the brig back, and draw upon him for the deficiency, as might be most adviseable.”

These instructions, it seems, were not literally executed on the part of Mr. *Gelston*. He thought it better on account of his own inexperience, to apply to Mr. *Skipwith*, who was the *American* consul at *Paris* ; but who is to be taken nevertheless as a *French* merchant in such a transaction ; since there can be no doubt, that, notwithstanding his consular character, he is to be considered in all commercial transactions on the same footing as any other resident merchant in *France*, to whose experience and prudence Mr. *Gelston* might apply, for counsel and assistance in the management of this cargo.

It appears to have been the original intention, that the cargo should be sold in *France*, but as the whole of it could not be disposed of there, some part was shipped off for *England*. Of this notice was sent to Mr. *Ingraham*, and he was advised, that instead of the returns which he had directed to be sent to *America*, he might draw on Mr. *Godefroy* at *Hamburgh*, with whom *Skipwith* had other concerns, and with whom he undertook to lodge funds to answer such bills.

On board the *Josephine* which sailed from *Havre* in July 1795, were several ingots of silver. Some have been restored to another *American* merchant, on complete proof being made to the satisfaction of the Court, by correspondence prior to the shipment, that they were shipped on his account. Besides that silver, there

there was another quantity for which there was no bill of lading, but a mere note of specification, "of so many ingots, going to be delivered to Mr. Godefroy for account of Mr. Gelston." There is no evidence shewing that *Gelston* had acquired, either by the possession of a bill of lading, or any other instrument, a controul over this silver.

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It is now contended, that this silver belongs to Mr. *Ingraham* of *New York*, and that he will be the only loser, if it is pronounced subject to condemnation. Farther proof has been directed to be made of the property, and it has been brought in; and the only question for the consideration of the Court is, whether this silver is to be taken, as having legally, or equitably, become the property of Mr. *Ingraham*, or not? In some of the affidavits it seems to be represented as part of the actual proceeds of the outward cargo. How this silver was specifically more the proceeds, or a part of the proceeds of this cargo, than of any other mercantile transaction of Mr. *Skipwith*, I do not see; it is not averred that it was received in exchange for any part of the cargo (a); for all that appears, it was a

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(a) Mr. *Skipwith* writes to *Godefroy*, after the capture, "I brought myself considerably in advance in making the shipment of ingots by Capt. *Fish*, because the goods in my hand, were *then*, and are indeed mostly *now*, on hand. I cannot therefore enable you to answer Mr. *Ingraham's* drafts." And again to *Ingraham*, Nov. 5, 1795,—“In order to support your credit, I took on myself to advance to *Gelston* in ingots of silver, &c.” The fact was not correctly, as stated in Mr. *Ingraham's* attestation, “that *Skipwith* and *Gelston* had converted part of the cargo into silver, and transmitted it to *Kent*, to ship the same to *Hamburgh*.”

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(a) The corre-  
spondent of  
Skipwith, and  
the actual ship-  
per at Havre.

(b) 29 Decem-  
ber, 1799.

part of Mr. *Skipwith's* general capital, of which he might choose to apply such a proportion to this particular use. But it is said, that it was going to Mr. *Godefroy*, to provide the funds, on which Mr. *Ingraham* was to draw; and that it is in that point of view to be considered as vested in him. How it could vest immediately in *Ingraham*, documented as it was, in the name of *Gelston*, it is not easy to understand. If it was to vest in *Ingraham*, why was it described as the property of another person? Of that circumstance I have received no satisfactory solution. Supposing it to be satisfactorily explained, and allowing that it had been documented for Mr. *Ingraham* himself, could it be legally considered as appropriated to him? In what respect is it so appropriated? The master says "that he had no communication with Mr. *Gelston*, *Ingraham's* agent, but only with *Kantz* (a), from whom he received the silver, with verbal orders to deliver it to Mr. *Godefroy*, but that as to the property, he has no grounds on which to form any belief." It was utterly unknown to him that Mr. *Ingraham* had any claim upon it. It does not appear that there had been any previous correspondence respecting it, nor any notification accompanying it, informing Mr. *Godefroy* what he was to do with it. Mr. *Gelston* was a perfect stranger to Mr. *Godefroy*. That no communication should be made to Mr. *Godefroy*, is certainly a very extraordinary circumstance. Mr. *Skipwith* says in his affidavit (b), "that he did not give Mr. *Godefroy* any information, meaning to wait till the silver was actually arrived at *Hamburgh*, before which time it was impossible that Mr. *Ingraham's* drafts could be received, and because it was necessary, that shipments

of

of silver in *France* should be made with great secrecy." Still it is, I think, very strange, and very much out of the course of ordinary commercial transactions, that it should not have been intimated to *Godefroy*, in any manner, either that *some funds* would be sent by the first opportunity—Or who *Mr. Gelston* was—Or if any silver should arrive, whose property he was to consider it. Instead of that, there is nothing appearing in the original papers, or in the farther proof that has been brought in, to shew that it was the property of *Ingraham*, but the affidavit of the enemy *Shipper*, who describes it as the proceeds of the outward cargo. That being the case, whose property is this silver to be accounted? That question may be answered by proposing another: Whether *Skipwith* had done any thing to put it out of his own government and controul, and to transfer it to the government and controul of *Gelston*? The utmost that *Gelston* professes to know, is, that *Mr. Godefroy* was to be enabled to answer the draft of *Mr. Ingraham*; but whether by bills of exchange, or by what other means, does not appear from any declaration made by him.

Suppose the silver had actually arrived to the hands of *Mr. Godefroy*, and *Mr. Skipwith* had afterwards written to him, that he had altered his mind as to the disposition of this money, and that he should provide other funds to answer the credit of *Gelston*, or that he had nothing to do with *Gelston*; could *Godefroy*, who was merely the agent of *Skipwith*, have refused obedience to any order which *Skipwith* might choose to give him, as to the application of this money? In what manner could *Gelston* or *Ingraham* have obstructed

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structed the execution of such an order? As to *Ingraham*, he knew nothing of the matter; and supposing that *Gelston* knew, that the silver was shipped with the intention of answering *Ingraham's* bills, could he intervene to prevent *Godefroy's* obedience to any revocation of that intention, made by *Skipwith* to his own agent and banker; for that was the relation of *Godefroy* to the parties? What lien had *Gelston* acquired in this property which he could have used to intercept such a revocation? All that had been done, was, that *Skipwith* had informed his own agent that he had destined this money for such an use, and if he chose to vary that use, how could *Gelston* prevent it? If the remittance had been made to *Gelston's* or *Ingraham's* agent or banker, the character of this property would be different; but *Godefroy* has no privity with them; he is the mere servant of *Skipwith*. It appears to be the same transaction as if I sent a sum of money to my own private banker, directing him to hold it subject to the order of *A. B.*, and the next day, before any such order had been given, or even the fact of the lodgement known to the other party, I had changed my purpose, and directed a conversion of the money to any other object—could the banker have resisted with effect? Or had the other party a right to interpose, to claim that specific sum as property of his? It might be convenient to Mr. *Skipwith* to have funds at *Hamburgh*, in the hands of Mr. *Godefroy*, (for he appears from the letters to have many transactions of business with him), and it might be very convenient, that these funds should travel from *France* to *Hamburgh* with an appearance of an ultimate *American* appropriation; they might

derive a protection from that during the voyage, and yet, when got to *Hamburgh*, they might be disposable for other purposes : But take the intention to be ever so sincere, was it not perfectly revocable? Did not *Skipwith* retain the power of conversion without *Ingraham* or *Gelston* having any right whatever to controul him in the exercise of it? If so, the property remains with Mr. *Skipwith* ; it was a shipment going to the agent of Mr. *Skipwith*, subject to his order, Mr. *Ingraham* and Mr. *Gelston* having no document whatever giving them controul over it. Under these circumstances, *Skipwith* must be taken to be the legal proprietor; and as his property, this silver must be condemned, leaving the question of Mr. *Skipwith's* responsibility to his employer, untouched, and to be settled between themselves.

Condemned.

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THE JEMMY, NOSTEN Master.

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**T**HIS was a case of a ship asserted to have been purchased at *Dunkirk*, by Mr. *Schultz* of *Altona* ; this cause now came on to be heard on farther proof.

Ship purchased of the enemy, and left under the management of the former proprietor, cause of condemnation; farther proof not admitted.

JUDGMENT,

Sir *W. Scott*.—This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which, if the Court had known, it would not have permitted farther proof to have been introduced ; namely, that the ship has been left in the

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the trade, and under the management of the former owner. Wherever that fact appears, the Court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely *any proof* can avail against it. It is a rule which the Court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the Court to protect itself against frauds.

The positive objections which have been pointed out, on the fact of transfer, are also of considerable weight: The inadequacy of the price, and the chasms appearing in the correspondence, are circumstances inconsistent with the probability of ownership; there is also the course of trade, which has been entirely *French*, without interruption, excepting in one voyage to *Barcelona*; but even in that instance, the vessel returned again to a *French* port.

It would be impossible for the Court to admit further proof in such a case as this, without exposing itself to continual imposition. I have no hesitation in condemning this vessel.

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## THE TWENDE BRODRE, SCHALL Master.

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**T**HIS was a case of a *Danish* ship, and cargo of fir timber, spars, barks, and deals, taken on a voyage "from *Christiansand* to *Saint Maloes*, or *Brest*."

*Danish treaty, bois de construction, interpretation to be sought from destination. Fir barks to St. Maloes, not contraband—restored.*

*On the part of the captors*, a certificate was produced from ship-builders in his Majesty's yards at *Plymouth*, stating, 'That the cargo consisted of fir timber, hand-masts, deals, and spars; that the fir timber and masts were fit for naval purposes, and much wanted in his Majesty's service.'

*On the other side*, an affidavit was exhibited from other shipwrights of *Plymouth*, stating the timber to be particularly sappy in its quality, and not fit for ship building, and that no part could be considered as naval stores.

*On the part of the captors, the King's Advocate* contended;—that timber of this description was to be considered as contraband, under the *Danish* treaty, in which it was expressly stipulated, that timber, *bois de construction*, should be contraband, *fir planks excepted*. The exception proved, that fir planks would have been contraband, if not excepted; fir barks, *not excepted*, were, *a fortiori*, to be considered as contraband.

## JUDGMENT.

Sir *W. Scott*.—This is a ship which was taken on a voyage from *Denmark* to *St. Maloes*, as it appeared at the time of capture, having sailed originally on a destination to *Havre*, but having changed her course, in consequence of some obstacles, and

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under the direction of one of the owners of the cargo, for *St. Maloes*. It appears that she was first stopped by the *Juno*, and released, but afterwards stopped by the *Diana*, and brought into *Jersey*, with a cargo of timber on board.

It being contended that the timber was of such a nature as to come under the prohibition of the *Danish* treaty, the Court directed it to be referred to the inspection of experienced persons in his Majesty's yards; a return is now made to that inquiry, on which I must say, that it is not expressed in such specific terms, as the Court might have expected to obtain from a reference to those gentlemen. They state, 'That they had taken a survey, and find it to consist of *Dantzic* fir timber, *very serviceable for his Majesty's yards*,' but without any specification of its dimensions, or any description of its fitness for particular uses, by which its general character may be ascertained. There is another phrase in the report, equally general, 'That it is fit for naval purposes:'. What is that? It amounts to no information at all, since all timber is, I apprehend, fit for *some* naval purposes. There is another certificate, produced on the part of the claimants, from private unauthorized persons, selected by the owners, which is rather more precise; it specifies the size of the timber, and states, that 'it is very sappy, and not fit to be considered as *naval stores*.' This is all the assistance that the Court has obtained, to enable it to judge of the terms of the explanatory article, which was made in the treaty of 1780, for the purpose of avoiding all disputes, and of setting a clear understanding on the subject between the two countries.

In delivering my opinion on the construction which is to be put upon this article, it may be proper to consider shortly the intention of the parties, the terms or expressions of the treaty, the decisions of our Courts, and the interpretation of practice.

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With respect to the intention, it is to be remembered, that there had been much contest on this matter; the belligerent, on one side, contending that the enemy should not be supplied with timber, the neutral country, on the other side, contending for the liberty of exporting its own produce, one of the great staples of the country. It is fair to presume, from this situation of the parties, that there was no intention on the part of *Denmark* to give up the timber trade, or to abridge the exercise of that species of commerce, farther than the just demands of the belligerent might require: *Denmark* may be supposed to have agreed in these terms: '*We are willing to give up the liberty of trading, as far as your interests are affected, but no farther.*' The situation of the contracting parties does not warrant me to imagine, that there was any intention of giving up the entire benefit of the market of the other belligerent country, for all other timber, but only for such as might materially affect the operations of war.

If a cargo of timber is carried to *Rouen*, or *Havre*, for the purpose of being sent to *Paris* for house building, how is *Great Britain* injured by that? I am not to presume that there was any reason for demanding a sacrifice of such a trade, on one side, or that the other party would be willing to renounce a trade so beneficial to themselves, and so innoxious to the interests of the belligerent; I must conclude,

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from these considerations, that it was only meant to prohibit the carrying of such timber as is fairly to be deemed *ship timber*.

The terms used in the treaty are, '*Bois de construction*;' but that must be understood, *construction naval*: It must be confined to purposes of naval equipment. The great difficulty will be, to ascertain what is properly to be considered as *ship timber*. Timber has frequently, from particular circumstances, a definite and determinate character; it may be denoted by a particular form, as *knee timber*, which is crooked timber, peculiarly useful for the building of ships; or it may be distinguished by its dimensions of size; but as to other timber, *generally*, which is as much a thing of ambiguous use as any thing can be, the fair criterion will be, the nature of the port to which it is going: If it is going to *Brest*, the destination may be reasonably held to controul and appropriate the dubious quality, and fix upon it the character of ship timber—if to other ports of a less military nature, though timber of the same species, it may be more favourably regarded. Then, as to the decisions of Courts of Justice, and the interpretation of practice, I do not know that any express decisions have taken place; and it would be a most desirable instruction to my judgment, to have seen that of the superior Court exercised upon this subject. But it is the every day's practice of this Court, not to consider, as included within the prohibition, all that a more extended interpretation might justify: it restores *spars* and *balks*, of ordinary magnitude, unless there is something special in the circumstances attending them, to

show that they have a positive destination to naval purposes.

This then is the interpretation which I am inclined to put upon that treaty: With respect to such timber as is in its own nature ambiguous, I am disposed to look to the criterion of the destination, as an equitable rule of interpretation, taking a fair course between the rights of exportation of native produce, on the part of the neutral country, and the defensive rights of the belligerent. *Planches du sapin*, being expressly excepted in the treaty, may, I hold, be carried any where. In other timber, of an indeterminate nature, the judicial test is to be sought from the destination on which it is going. This being a case of timber going to *St. Maloes*—

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[*The King's Advocate* stated, some part of a letter to the master, which indicated a destination to *Brest*, "You are to go to *St. Maloes*, but if the cargo will sell best at *Brest*, you are to ask a pilot if he cannot take you thither; you may escape the *English* by going between the shore and *Ushant*."] ]

*Laurence*.—The original destination was certainly not to *Brest*; the ship went into *Havre* roads, and was then (after having been overhauled by a *British* cruizer) directed by one of the owners to proceed to *St. Maloes*.

*Judgment resumed*.—If there had been a clear and determined destination to *Brest*, notwithstanding it might be lately taken up, it would, according



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ing to the interpretation I incline to adopt, subject every part of the cargo, except the fir planks, to confiscation; for it could never be permitted to be averred, that a cargo of this sort might go on an innocent destination to *St. Maloes*, and then be sent on to *Brest* or *Rochfort*. If that were the case, it must be pronounced a case of condemnation; but the letter on which the captors rely, does now shew that the directions were absolute to that effect; the words, "if you resolve," indicate an ultimate discretion to have been reposed in the master: How does he execute it? He says, "that he was going to *St. Maloes*," not for the purpose of taking a pilot on board to carry him to *Brest*, but with a decided intention of making *St. Maloes* the ultimate port of his destination, and of discharging his lading there.

Upon the evidence I incline to hold, that the conditional directions which were given him to go to *Brest*, would not have been carried into effect; I shall therefore restore this cargo; especially as I perceive that no small part of it consists of fir planks, which I have already said, are specially protected; but in consequence of the expression of such an intention, I shall certainly hold that the captors are entitled to their expences.

*The Registrar.*—This is a cargo taken for the use of government; in such cases the ordinary expences are paid by government. Is it the intention of the Court, that the payment of the captors' expences is to be included in those charges, or to be paid by the claimant?

*Court.*

*Court.*—I mean that they should be paid by the claimant; the liberty given by the owner to the master in the letter, makes it not unfit that the expences should fall on him.

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THE CATHERINE AND ANNA, SPANGER  
Master.

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**T**HIS was a case of a ship and cargo of very considerable value, which had been decreed to be restored on payment of the captors' expences: In reporting those expences, the Registrar and merchants had refused to admit a charge of insurance against fire, which the captors had incurred, to the amount of about 270*l*. Application was now made on the part of the captors, to have the report re-committed, that the expence of insurance might be inserted.

Objection to the Registrar's report; insurance made by captor, not allowed, under the decree for paying captors' expences.

The Court desired to know the grounds on which the charge had been disallowed.

*Registrar.*—It was on the ground, that *the claimant* had before actually insured both ship and cargo; and could not have received any possible benefit under the insurance since effected by the captor.

*The King's Advocate said,*—that was a circumstance of which the captors were not apprized; that to insure, was a reasonable precaution for them to take, who were answerable for the custody of so valuable a cargo, and therefore that they ought to be indemnified.

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*On the part of the claimants, Arnold.*—Captors' expences include only, as it is generally understood, necessary expences, and not all that the captors may choose to incur on their own account. Insurance was not a necessary expence in the present case, inasmuch as the claimants had already insured. It is said the captors did not know this fact, but they might have informed themselves. They never apprized the agents of the claimants, that they were going to insure.

*Swabey* said,—That the Registrar and merchants had been in the habit of disallowing this charge in the last war.

#### JUDGMENT.

*Sir W. Scott.*—The ship and cargo in this case have been ultimately restored; but the Court has decreed the captors' expences to be paid, by expences meaning those expences that are necessarily incurred by the act of capture, to which the Court adverted in making the decree. The question is, whether this charge of insurance is such a necessary expence as the captors were bound to incur? Captors are generally bound for two things—for safe and fair custody, and if the property is lost or destroyed for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident, or mere casualty, happens, against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged. If to secure himself against the negligence of his own agents, or to secure his own responsibility, the captor chooses

to

to make insurance, I understand the practice of the Registrar and merchants has been, not to allow it in their report, and I am not prepared to say, upon any principle which occurs to me, that such a disallowance is wrong. The security of the claimant must be considered, as depending upon the obligation of safe custody, and personal responsibility in case of loss, on the part of the captors. The claimant is not bound to look further, nor to contribute to the expence which the captor, for his own security, may choose to incur. It is said that insurance is an advantage to claimants, because it increases the responsibility of the captors—and so it does; but this is an advantage accidental, and collateral. The captor who makes a seizure, engages for his own personal responsibility to the party whose property is seized; he seizes at the peril of making full restitution in case restitution is due; and he is to find the means of making that restitution. If the aid of insurers is requisite for such a purpose, it may be very advisable for him to resort to it; but the claimant has nothing to do with that; he has a right to consider the captor as fully responsible, and is under no obligation to contribute to the expence of any additional security.—The matter of insurance is, *res inter alios acta*; I do not know that the captor is, in any event, compellable to assign to him the benefit of his policy. In the *St. Eustatius* cases (a), where ships and goods insured by the captors, on their voyage to *Europe* for adjudication, were

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(a) The Registrar had said, that no instance had happened during the present war, but he thought in the *St. Eustatius* cases there was a question of a similar nature.

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taken by the enemy, I think the determination was, that the claimants had nothing to do with the benefits of that insurance.

On these grounds, I am disposed to hold, that whatever means the captors may take to relieve themselves from their personal responsibility, it is a matter which is foreign to the claimant. Where the Court orders a removal, and a fresh risk is incurred, for which the Court directs an insurance, it may be subject to a different consideration. But this being a case in which no application has been made to the Court, where the captor has voluntarily taken the step for his own protection, and where he is not, as I conceive, compellable in any respect to make an assignment of his policy, I cannot think that it could, under any circumstances, be deemed a charge that ought to be thrown on the claim. But *where* the claimant himself has actually insured, the demand is utterly unsustainable. In such a case, to lay upon him the additional expences which the captor incurred for his own security, would be highly injurious. It was asserted before the Registrar and merchants, that such an insurance had been made by the claimants, and it was not questioned, as I understand, at that time. Further evidence might have been then demanded: It might have been required of them to produce the policies of insurance; nothing of the kind was then done; I shall not now direct them to be produced, but take the fact to be as it is asserted, upon the admission of the captors at that time given.

On these grounds I am of opinion, that the charge in question, being for insurance made for the benefit of

of the captor, without communication with the other party, and without any application to the Court, must be taken to be an expence incurred for his own security, and not chargeable on the claimant. Were it necessary, I should hardly hesitate in pronouncing for the justness as well as for the application of the general rule, alleged to be observed by the Registrar and merchants.

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Report confirmed.

THE HENRICK AND MARIA, BAAR Master,

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**T**HIS was a case of a *British* vessel taken by a *Dutch* privateer, 2d October 1795, and carried into *Norway*. It appeared that a sentence of condemnation had passed 24th March 1796, at the *Hague*, before a Court, styled 'The Committee of the Affairs of the Marine of the *Batavian Republic*.' On the 9th of *June* following, the ship was sold at *Christiansand* to a *Danish* merchant, and was afterwards captured, 21 *June* 1796, with a cargo of fir timber, on a voyage to *Amsterdam*.

Condemnation  
in the court of  
the enemy, on  
a prize ship,  
lying in a neu-  
tral port,—  
under what  
considerations  
held sufficient  
to warrant a  
sale to a neu-  
tral merchant.

On the part of the captors, it was first contended, that the ship was liable to condemnation, on the ground of violating the blockade of *Amsterdam*: *vide* *supr.* v. 1. p. 149. After the judgment of the Court on that point, a farther question was made, respecting the legality of a transfer of a prize ship not being carried into the port of the captors' country.

On the part of the *Danish* claimant, *Lawrence and Croke*.—This is a case of a ship taken out of the possession of a neutral merchant, who appears to have

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have purchased at a public auction in his own country, and for a valuable consideration. The only question which is now raised against his title to restitution, is founded on an objection to the manner in which the title of the former *British* owner was divested. As far as the rights of war were concerned, in which alone the captor could assert an interest, all questions of that kind have been already disposed of by the Court. The captor therefore has no competent character in which he can be heard to agitate the question of property, depending between the former *British* proprietor and the neutral purchaser. As *captor*, he can claim only a right of salvage, if the property should be adjudged to the former *British* proprietor; but as long as that person does not come forward to support his own pretensions, it is not competent for *any other person* to set them up for him. Some steps are indeed said to have been taken preparatory to making a claim; but as a year and a day have elapsed since the capture, and no claim has actually been advanced, the question of property is precluded against the former owner; and it is not competent to the captor to set up a title, which the asserted proprietor himself must be taken to have abandoned. Allowing however that this *could be done*, in what does the objection to the title of the neutral purchaser consist? It is contended on this head, that no valid transfer or conversion could take place, inasmuch as the vessel was a prize vessel, carried by the captor into a neutral country, and left lying there, whilst the sentence of condemnation passed on her in the Court of the country of the captor. In the first place, how is this proved?

By

By inference only, and by circumstances given in the description of the vessel, for the purpose of bringing her to a public auction. On the other hand, there is the sentence of a *competent tribunal*, reciting the condemnation ; from which it is to be supposed, that all things have been rightly and legally conducted. Such a sentence establishes the *presumptio juris et de jure*, against which no averment can be admitted ; it is a complete bar to any discussion of the circumstances composing the merits of the case in a foreign Court. In the case of the *Fladøyen*, where the sentence was the act of a tribunal *manifestly* incompetent, as established in a neutral territory, the case was very different : Such a sentence was as nothing. But when a competent Court of prize, established in the territory of the belligerent, has proclaimed the condemnation to have passed, it is not open to this Court to dispute the efficacy of it, or call in question subordinate circumstances, with a view of examining the validity of that sentence. How is the Court to proceed to try the facts, if it is disposed to go beyond the sentence itself ; or where would such a scrutiny terminate ? If one fact is questioned, all may as well be brought back to judgment ; and how is the neutral purchaser to obtain such evidence as shall be sufficient to answer all these investigations, after an interval of three years ? As to *the fact* in question, the terms of the sentence seem to imply, that the ship was actually in a *Dutch* port—But if it were otherwise, in what respect is the sentence of condemnation invalidated by the mere local absence of the vessel which is the subject of that condemnation ? Neither the reason of the

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the thing, nor the opinion of jurists, nor the practice of nations, will sustain any such objection. As to the first and second of these authorities, the reason of the thing, as it has been discussed and canvassed by eminent jurists, no exception has yet been taken, that goes the length of the principle here contended for on the part of the captor, *vis. That the ship must necessarily be brought within the ports of the captor's country.* Some writers on the law of nations have thought with *Puffendorf*, that the title is not complete till the conclusion of peace; on a supposition that property cannot be changed but by consent, which is not to be presumed till peace. This is, however, untenable, inasmuch as it is the ordinary course of all established jurisprudence to convey titles, very much in opposition to the will and consent of the original proprietor. If it is allowed, that prize is a legitimate mode of acquisition *jure belli*, some period of time, and some circumstances, short of the consent of the owner, there must be, that shall have the effect of establishing an absolute title in the thing so obtained. The question will be, What is that precise time, and what are those circumstances, under which that right shall be supposed to vest?

By some writers, *possession alone* has been deemed sufficient: but that rule, however agreeable to notions of natural occupancy, is defective in practical convenience; and therefore a middle doctrine has generally prevailed, under which it has been held, that something of a secure and definite possession is required, to establish and complete the property in prize; that it should be in the possession of the captor twenty-four hours, or that it should be brought *infra præsidia*.

This

This principle of security does, however, in no manner require that it should be brought *infra præsidia capientium*, since whether it be a port of the captor, or a neutral port, that ingredient of a good title, *security*, is equally strong. In support of this reasoning, are to be reckoned, *Bynkershoek*, *Vattel*, *Emerignon*, and the venerable authority of the *Consolato*. The rule, of *twenty-four hours' possession*, is sufficient to shew that a sentence of condemnation is not in point of law required to establish the title of property. Admitting however that it were necessary, as highly proper and commodious to give due solemnity and precision to the act of war, it by no means follows that the thing itself should be brought into the ports of the captors. Courts of municipal law hold daily cognizance of matters passing out of their local jurisdiction; matters beyond sea are, by fiction of law, brought as regularly before them, as transactions in their own neighbourhood; and even this Court of Admiralty has, for a long course of time, been in the habit of entertaining and deciding questions of prize, by depositions taken at *Lisbon* and *Leghorn*, and on property actually carried thither, and left in those ports.

The objection to this practice is, in truth, not the same as that applying to Consular Courts; with respect to Prize Courts erected in a neutral country, numberless objections occur; not the least of which is, that such a practice would leave the owner at a total loss where to look for his property. But if the tribunal is fixt in the country of the captor, that inconvenience cannot exist. The documents and depositions of the crew may be easily

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(a) Dec. 31st,  
1787.

(b) Sept. 9th,  
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(c) A. D. 1695.

easily transmitted, and the essential parts of the proceedings will be the same, as if the vessel herself were actually sent home. In conformity to this reasoning is the practice of other nations. The ordinance of *Russia* (a) directs the sending of prizes into neutral ports: So the edict of *Venice* (b) authorizes the receiving of prizes brought by belligerents into that port, in a state of neutrality. The ordinances of *France* also countenance the same practice, and direct the papers and depositions to be transmitted home by the *French* consul in the neutral port. As to the practice of our own country, whatever distinction might be pointed out, from the relation which the port of *Lisbon* may be said to have borne to this country, it must arise from private treaties only, which cannot alter the law of nations, or affect the rights of other parties, who may be concerned in such an assumption of privilege on our part. But there are also other instances, of ancient date, in which our public ordinances (c) contained directions for carrying prizes into the ports of *Naples* and *Sicily*; and in a later instance, in the ordinance of 1740, the same direction is continued, at a time when those countries were perfectly neutral. In opposition to this series of continued practice, it is impossible for the Court to lay down a rule which shall deny to others the rights which we claim for ourselves. A case like the present, more especially, in which the title of the neutral purchaser is not litigated on the part of the former proprietor, is *not* a case which the Court would select for the purpose of establishing such a *principle*, which, however fit or proper on notions of speculative propriety, cannot be advanced, but in direct reprobation of our own practice.

On

*On the part of the captors, the King's Advocate and Sewell.*—The general question is, whether this vessel has been legally acquired by the asserted *Danish* purchaser, and that will depend on two other questions: Whether it has been *legally condemned*, and *legally transferred*? On these points it is by no means incompetent to the captor, to contest the title of property against the *Danish* claimant; for as the vessel was, unquestionably, taken under reasonable grounds of seizure, arising from her destination to a blockaded port, the captor has a right to avail himself of all circumstances that may turn out favourable to him, in the course of the discussion. In the history of this vessel, a circumstance did immediately transpire, adverse to the title of the present holder, on grounds connected with the rights of war, and the law of property, as it may be affected by the incidents of war. The ship appeared to have been a *British* vessel captured by the enemy, and ostensibly transferred by him to the present claimant. If any definite form and conditions are necessary, by the laws of nations, to render such a transfer valid, the consequence will be, that if, for want of a compliance with those terms, the transfer is *invalidated*, the ship relapses into the character of enemy's property, and, as such, becomes lawful prize to the captor, till some other title, (such as that of the original proprietor, resulting out of the regulations of a domestic policy,) is set up against him. It is therefore fully competent to the captor to litigate the whole question. As to the proof of transfer, that is manifestly defective, inasmuch as no payment is proved, in any other manner than by the claimant's own attestation. Whatever else is collected from the payment of the auction dues,

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and other circumstances, might equally suit any transfer, collusive, or real. But a more important point is, the legality or illegality of such a condemnation, as passed on this vessel, when lying in a neutral port. On this head it is contended, that the *sentence of a competent tribunal* is conclusive; that it is a complete estoppel: That answer will not dispose of the present question, which is addressed to the previous inquiry, Whether *there has been a competent sentence of a competent tribunal*? For a Court may be competent to some acts, and not to others (a); and if it is proved, from the history of the vessel, and not rebutted by any contrary evidence, that there has been an omission of an *essential previous circumstance, viz. That the ship was not carried by the captors, to receive a sentence of condemnation in their own ports*, it is open to the Court of the belligerent, to discuss the question, Whether a sentence passed in such a manner, is entitled to be considered as a competent sentence—*competent to the effect, of warranting a sale to the neutral purchaser*? On the force and general obligations of established forms on this point, it is to be observed, that they are by no means matters of indifference, with which neutral merchants have nothing to do. If the acquisition of this species of property becomes more easy to them by the events of war, and attainable on advantageous terms, to which the experience of

(a) See on this point a distinction, in Sir *Leoline Jenkins*, v. 2., p. 762., where it is said, "That though a foreign Court, (the Parliament of Paris), will not examine the merits of a principal cause, tried before a Court generally competent, (the Court of Venice); yet they might and did examine, whether things had been in a proper course, whether such Court had acted regularly, (as in giving due summons, &c.) according to the style of their ordinary proceedings," &c.

this war proves, they are by no means inattentive, it is but reasonable that they should take it, subject to those forms of law, which are universally required by belligerent nations in this respect.

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Then on what ground can it be maintained, that such a sentence is valid? On all general reasoning, the mischief of such a practice is nearly as great, as what is imputed to the practice of holding Courts for condemnation, in a neutral state. A new seat of war is acquired to one belligerent, at the expence of the enemy, and an easy refuge from pursuit is obtained. As to the authority of writers on this point, it has long been *vexata questio* between them; and the arguments have generally gone wide of the practical effect, which is principally to be considered; The fallacy of arguments usually advanced, lies in passing over this fact, that the proceedings of prize are proceedings entirely *in rem*. It is necessary for the purpose of substantial justice, that the thing itself shall be under the power of the Court passing sentence upon it. Suppose that the ship had, in this instance, been a privileged ship under cartel, of which the *English* claimant, in the original capture, might have obtained a sentence of restitution, in what manner, or by what authority, would it have been enforced, so as to afford him effectual redress, in the restitution of his property?

It may be said, that the captor is, in some degree, subject to the orders of his own tribunal, and that the claimant may have his resort personally against him; but that is to draw the matter from its original course, and to omit the principal circumstance that gives efficacy to the proceedings of Prize Courts, *viz.* that they

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*act in rem*, and are capable of awarding a speedy, and specific, restitution, of the property in dispute.

If then the theory of a looser system be radically bad, when it is attempted to be reduced to practice; it is of little consequence to discuss what opinion speculative writers may have entertained on the subject. It cannot escape notice, however, that the principal authority which has been relied on, *that of Bynkershoek*, is in direct opposition to the decision of the tribunals in his own country (*a*)—the very country on whose practice the present question is raised.

(a) Bynk. Q. I.  
P. lib. i. ch. 5.

As to the general practice of *European* nations, some modern edicts have been relied on, and some instances have been cited from the practice of our own country, though without any precise detail of the circumstances attending them. In opposition to these authorities, abundant instances are to be produced from the older edicts of *England, France, Holland, and Spain* (*b*), directing that prize should be brought within the ports of the captor; and in a late instance, in the practice of this Court, where a decree had passed on a prize ship, taken by stress of weather to *Norway*, the Court, when that circumstance was brought to its knowledge, rescinded the decree, declaring, that it would not condemn a vessel lying in a neutral port (*c*). Under these circumstances, considering that the practice contended for, is in departure from the ancient ordinances of all countries—that it is inconsistent with the main practical principle of the Prize Court, so necessary to found *its proceedings in rem*—that it is fraught with incalculable mischief, as confounding the relation

(c) The *Herstelder*, 1 Adm.  
Rep. p. 119.

(b) Collect. Marit. page 31.

of

of states, and converting the security of neutral ports into stations of war ; considering, at the same time, that whatever instances are adduced as giving countenance to this practice, are but so many irregularities, from which no authority can be drawn—it is submitted, that the Court will now re-establish the true rule, by pronouncing the sentence passed on this vessel to have been defective in the main circumstance, necessary to give it legal effect—consequently, that the transfer is invalid, and that the ship, as still the property of the enemy, is subject to condemnation.

Judgment reserved.

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*On a subsequent day.*—JUDGMENT.

Sir *W. Scott*.—This is a *British* vessel, captured by a *Dutch* privateer, carried into *Norway*, and sold there, under a sentence of condemnation passed at the *Hague*. It has been contended, that there is not enough to shew, that the vessel had *not been actually* removed to *Holland*, at the time of the sentence ; and an expression in the sentence, ‘ brought to judgment,’ has been relied on as leading to a contrary conclusion, and as intimating that she was *actually brought* to *Holland*. I am satisfied, however, as to that fact ; the term, ‘ brought to judgment,’ is merely a figurative expression, signifying, that the question respecting that ship, was brought to judgment. The whole tenor of the instruments describe the ship herself as situate elsewhere. The bill of sale speaks of the ship as lying in *Christiansand*, where she was carried with several other *English* vessels, which had been taken by *Dutch* privateers and put under the direction of the *Dutch* consul residing at that place ;



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place; she is described as 'to be sold in the condition in which she had been there lying, for the inspection of purchasers;' If she had been removed into *Holland*, the fact was perfectly capable of proof; but it is not even averred, in the proofs that have been introduced on the part of the *Danish* purchaser. A claim has been given on behalf of the former *British* proprietor, and the question that arises, is, Whether the *Danish* purchaser can hold this vessel by the title of a condemnation passed upon her, whilst lying in a neutral port, she having never been conducted into the country of the captor, nor into any port of an ally in the war? It has been contended, that such a sentence is perfectly legal, both on principle and authority.—It is said, That on principle, the security and consummation of the capture is as complete in a neutral port, as in the port of the belligerent himself. On the mere principle of security, it may, perhaps, be so; but it is to be remembered, that this is a matter not to be governed by abstract principles alone: The use and practice of nations have intervened, and shifted the matter from its foundations of that species: The expression which *Grotius* uses on these occasions, '*placuit gentibus*,' is, in my opinion, perfectly correct, intimating, that there is a use and practice of nations, to which we are now expected to conform,

Without entering into a discussion of the several opinions, that have been thrown out on this subject, I think I may state, the better opinion and practice to have been, That a prize should be brought *infra præsidia*, of the capturing country, where, by being so brought, it may be considered, as incorporated into the mass of national stock. The greatest extension that

that has been allowed, has not carried the rule beyond the ports or places of security, belonging to some friend or ally in the war, who has a common interest in defending the acquisitions of the belligerent, made from the common enemy of both.

In later times, an additional formality has been required, that of a sentence of condemnation, in a competent Court, decreeing the capture to have been rightly made, *jure belli*; it not being thought fit, in civilized society, that property of this sort should be converted without the sentence of a competent Court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require, that such exercises of war, should be placed under public inspection; and therefore the *mere deductio infra præsidia* has not been deemed sufficient. No man buys under that title; he requires a sentence of condemnation, as the foundation of the title of the seller; and when the transfer is accepted, he is liable to have that document called for, as the foundation of his own. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation, for bringing the property, on which it is to pass, into the country of the captor; for a legal sentence must be the result of legal proceedings, in a legitimate Court, armed with competent authority upon the subject matter; and upon the parties concerned—a Court which has the means of pursuing the proper enquiry, and enforcing its decisions. These are principles of universal jurisprudence applicable to all Courts, and more peculiarly to those which by their constitution, in all countries, must act  
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*in rem*, upon the *corpus* or substance of the thing acquired, and upon the parties, one of whom is not subject to other rights than those of war, and is amenable to no jurisdiction, but such as belongs to those, who possess the rights of war against him.

Upon principle, therefore, it is not to be asserted, that a ship, brought into a *neutral port*, is with effect proceeded against in the belligerent country. The *res ipsa*, the *corpus*, is not within the possession of the Court; and possession, in such cases, founds the jurisdiction. What is the authority over the parties? Over the captors it is complete, on account of their personal relation to the belligerent country. The neutral government may be called upon, in the usual mode of requisition known to the law and practice of nations, to enforce upon *them* the orders and decrees of the state to which they belong. But how will it be maintainable over the other parties, who are not subjects either of the neutral or belligerent state, and are, in respect to the point in issue, only subject to a jurisdiction of war? The belligerent state itself has not the means of exercising the rights of war over them directly:—Can it call on the neutral state by requisition so to do? Most clearly not. The neutral state has nothing to do with the rights of force, possessed by the one belligerent against the other; it has nothing to do with the enforcement or consummation of such rights; it owes to both parties the simple rights of hospitality, and even these are very limited in the practice of most civilized states. By the regulations of *France*, foreign ships are forbidden to enter with prizes into a port of *France*, except in cases of distress, and then they are permitted to stay no longer than their necessity exists.

Valin

*Valin* observes on this article, that it cannot be doubted, that such a rule is exactly conformable to the laws of neutrality; and *Hubner* admits, that a wise hospitality will not be exercised beyond this. At any rate, the neutral state can have no compulsory jurisdiction, to exercise upon either party, upon questions of war depending between them; nor can any such jurisdiction be conveyed to it by the authority of one of them. Its own duties of neutrality prevent the acceptance of any belligerent rights; it cannot be called upon by requisition to give any facility or convenience to the one party, to the prejudice of the other, much less to apply modes of compulsion to the one, to serve the hostile purposes of the other.

In the administration of a jurisdiction of this kind, the enemy who is vanquished, is not only a necessary party, but likewise a *necessary* witness, according to the proceedings of all countries. Prisoners are necessary witnesses to be examined; according to our instructions they are the *only* witnesses; the *French* regulations (a) admit the evidence of the captor, but hold at the same time, that natural justice requires the crew of the captured vessel should be examined touching the rights in question. How are they liable to be compelled to undergo such examination? No force can be applied in the way of strict or continued imprisonment to compel their answers to interrogatories. Their refusal would carry no consequence of legal contumacy with it; for legal contumacy can only

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(a) The *French* practice has always admitted the depositions of the captors, as well as the prisoners. Ord. 1400, Art. 6, *Col-lectanea Maritima*, p. 76. In this country the depositions of the captors are not received.

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(a) Q. I. Pub.  
lib. i. ch. 5.

exist, where a legal jurisdiction has demanded a submission. From these considerations it should seem to result, that in the case of a ship lying in a neutral country, there is not only a want of original jurisdiction, in the belligerent country, from the want of possession; but that there is, likewise, a substantial defect of that authority, which is required for the attainment of justice, and which is essentially necessary to give effect to the ceremony of condemnation. Conformably to this view of the matter, all the more ancient instructions given to cruisers, in almost every country, require that prizes should be brought into the ports of the country, to which the cruisers belong. In *Denmark*, so late as 1710, it is required under pain of death. In our own country, the general instructions still in use are, "to bring them into some ports of our dominions." In *Holland*, it appears in the instructions cited in the argument from *Bynkershoek* (a), that the States did not consider it sufficient, for a prize to be brought into the parts of an ally in the war, for they require, in the terms of their judgment, that it should be brought into the ports of the captor. In *France*, where the practice of the Prize Courts has fluctuated more than in any other country, according to temporary views of convenience, no relaxation of the strict rule appears to have been introduced, earlier than 1705; and it is worthy of observation, as an inconsistency, and injustice of no small magnitude, that at the very time when their edicts forbade the cruisers of other countries to bring their prizes into the ports of *France*, they should authorise their cruisers to carry their prizes into the ports of other countries. That edict appears to have

been revoked in 1759. *Valin* speaks of it rather as a recent and tolerated usage, than as a legal practice in 1763. It was renewed at an early period of the present war in 1793, and has since been largely indulged; but the editor of the new *Code des Prises*, I observe, speaks of it as an innovation, and in terms of considerable asperity. I am not aware that any instructions have issued from this Government, during the present war, permitting the carrying of prizes into other ports, than those of allies. Some instructions have been alluded to, as permitting, in former wars (a), the carrying into *Lisbon* or *Leghorn*: I conceive (speaking without answering for the success that might attend a more persevering enquiry on such a subject), that such instructions have issued from this Government only, when the Sovereigns of those ports, the Kings of *Portugal* and the Dukes of *Tuscany*, have been allies of *Great Britain* in the wars of *Europe*.

Some instructions have likewise been alluded to, authorising the cruisers to carry their prizes into the ports of *Naples* or *Sicily* (b); but I presume at no period, in which the governing powers of those countries, or at least the parties in those countries whom we contended to be legally entitled to the government of them, were not engaged in some common confederacy with us.

If the practice of our Courts had conformed to instructions, so restricted, the question would not have

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(a) It had been said in the argument, that the instructions of 1740, directed prizes to be carried into *those ports*.

(b) Instructions, 1694. *England* then confederate, in the war, with *Spain*.

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been subject to much difficulty, for it would still have remained within the pale of the principle which confines the jurisdiction of prize, to the cases of prize brought to the ports of the capturing country, or of an ally in the war, which, as to the operation of the common war, *unam constituunt civitatem*, with the belligerent. But it is not to be denied, that the Court of Admiralty has gone further : It is now for a considerable time, that this Court has been in the habit of condemning prizes carried to *Lisbon* and *Leghorn*, at times when I am not at liberty to say, that the Sovereigns of those ports were engaged in a common war against the enemy of this country. The fact, that the ships proceeded against *here*, were *lying there*, has not been dissembled. Such I take to have been the fact in the war called the *American* war, as well as the war preceding. In the war of 1756, I find commissions from this Court, issued in that year, to *Madeira*, to *Leghorn*, and to *Lisbon* ; and in 1757, to *Genoa* ; in 1758, to *Messina* ; and in 1759, to *Naples*, for the examination of *French* prisoners of war, carried into those ports ; and these commissions were extended, on the breaking out of *Spanish* hostilities, to the examination of *Spanish* prisoners of war, carried to the same ports. On the breaking out of the *American* war, in 1776, commissions were granted to *Lisbon*, *Leghorn*, and *Oporto*, for the examination of *American* prisoners of war carried there ; on the breaking out of *French* hostilities, the commissions for these places, with the addition of *Naples*, were enlarged for the examination, of *French* prisoners—and in a following year or two, of *Spanish* and *Dutch* prisoners, with the additions of the ports of *Genoa* and *Nice*.

*Nice*. In the present hostilities, commissions of a similar nature have issued to *Civita Vecchia*, *Genoa*, *Leghorn*, *Lisbon*, *Nice*, and the ports within that consulate, *Naples* and *Oporto*. Now unless it can be shewn that there is something in the nature of all these ports, that essentially distinguishes them from the common character of neutral ports, not merely in certain other respects, but such as furnish a ground of solid distinction for purposes of this nature, I think it will be difficult to avoid the consequence, that whatever the correct principle may be, and however much it might import this Country to respect and enforce this principle, this Court, *at least*, is bound against that principle by its own practice.

With respect to the characters of *Lisbon*, *Oporto*, and *Leghorn*, it is not to be denied, that they are of a peculiar nature. The two first are cities, one of them, the Capital, of a State, which has long maintained a singular relation of something more than amity to this country. The subjects of this country resident there, are distinguished by special privileges; they retain the *British* character, in spite of the *Portuguese* domicil, even in the estimation of the enemy himself, and they exercise an active jurisdiction, at least over their own countrymen established in those ports. The other port (*Leghorn*), though belonging to a Sovereign who is neutral, and singularly tenacious of that character, from circumstances peculiar to his policy, offers large and distinct privileges to *British* subjects, continues to them their *British* name and attributes, and authorises them to exercise a large jurisdiction over their countrymen. These circumstances might naturally enough lead to the consequence,

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quence, which has taken place,—that the *British* Courts of Admiralty have been in the habit of exercising, with the permission of those governments, (and without any remonstrance made to them on the part of the other belligerent) a prize jurisdiction over vessels captured and carried in there. But though the peculiar relation which these ports bear to this country, may account historically for the introduction of such a jurisdiction, (which may have since been carried to other ports, where the same foundation for it did not exist); yet even there, it may be doubted, whether it furnishes a solid ground, on which such authority can be maintained. Supposing that there was authority enough existing to operate with legal effect upon the body of the thing, in what manner does it exist, over the persons of the subjects of other countries, carried prisoners there by a *British* cruiser? All the personal jurisdiction which the *British* establishments possess, is over their own members; over the subjects of other countries, how is it communicated? They cannot be compelled to appear as parties or witnesses; and if in these ports any sufficient footing could be found for such an authority, its foundation would still be to look for, in some of these enumerated ports, which appear entitled to no such distinctive character.

I am of opinion on these grounds, that this Court is bound, against the true principle, by the practice which it has not only admitted, but applied. The observation of *Bynkershoek* (a), ‘That, in the conduct of war, you must hold that to be lawful in your enemy, which you practise yourselves,’ a rule true in all in-

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(a) *In jure belli, quod quis sibi sumit, hostibus tribuendum est.*

stances, is not more true in any instance than in one, in which the rights and interests of other countries, being neutral, are so directly concerned.

How far the superior Court will consider this question as concluded by the practice, even an inveterate practice, of this Court, is more than I can say. It might be extremely proper, that the opinion of that Court should be taken on this important question. It may deem it to be its duty, for any thing I know, (for it would be presumptuous in me to hazard a conjecture), to recal the practice of this Court to the proper purity of the principle. But sitting here, and observing, as I am judicially bound to do, the course of judicial administration which has prevailed, I do not feel *myself* authorised to uphold the sentences, which have passed in this Court, over prizes carried into foreign ports, and disallow at the same time, the validity of such as the enemy has pronounced, under circumstances so nearly similar, as not to afford ground of distinction between them, which appears to my judgment, sufficiently solid.

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#### THE FRAU ILSABE, PIEPER Master.

Aug. 4th,  
1801.

**T**HIS was a case of a cargo taken on a voyage from *Hamburgh to Antwerp, September 1799*, and proceeded against, for a breach of the blockade of *Holland*.

Blockade of  
*Holland*, not  
violated by a  
destination to  
*Antwerp*.—The  
*Scheldt*, a con-  
terminous river.

*The King's Advocate*.—The ship in this case has been restored by consent, but it is to be wished, that she had been detained; or that bail had been taken to  
answer

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FRAU ILGABE.

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answer adjudication on this question of law, which may still affect the cargo, *viz.* Whether the *Scheldt* is not to be considered as included in the blockade of *Holland*, as a river of *Holland*, which had always in time of peace, been kept a close river, and has now been opened only by the force of war?

#### JUDGMENT.

Sir *W. Scott*.—*Antwerp* is certainly no part of *Holland*; and with respect to the *Scheldt*, it is not within the *Dutch* territory, but rather a conterminous river, dividing *Holland* from the adjacent country. And though by treaties with the *Dutch*, made in favour of the *Dutch*, we have considered the *Scheldt* as shut up, and appropriated to the use of *Holland*, yet those treaties being extinguished by our present war with *Holland*, it is too much to say, that it is at this time to be legally regarded as standing upon that footing, particularly for the purposes of a blockade, which is to act upon the interests of other states, who might be no parties to those treaties, even when they did exist. If the government had notified in express terms that the blockade was to include the *Scheldt*, which they might certainly have done, (for it was just as lawful to blockade the ports of *Flanders* as those of *Holland*), I should, of course, have enforced the rule so prescribed; but no signification being made, I do not think myself authorised to hold the *Scheldt* to be now necessarily included in the blockade of *Holland*.

THE

## THE STERT, JOHNSON Master.

August 4th,  
1801.

**T**HIS was a case of a cargo of butter and cheese, proceeded against on the ground of the blockade of *Holland*, and claimed for *Prussian* subjects. It appeared, that letters of orders had been sent to the shippers in *Edam*, directing them to ship the present cargo in a small vessel by the *inland* navigation to *Embsen*, consigned to *Rudolff* and Co. of that place, with orders to them to send it on to *London*.

Blockade of  
*Amsterdam* not  
violated by  
shipments to  
*Embsen*, by in-  
land naviga-  
tion, with ulte-  
rior destination.  
—Restored.

*On the part of the Captors, the King's Advocate* contended—that as the commencement of this trade arose in *Holland*, under a preconcerted plan of sending the goods on to *London*, without any other break in the continuity of the voyage, than a transshipment at *Embsen*, it was to be considered as a circuitous mode of avoiding the blockade of *Amsterdam*, and as a breach of that blockade.

*On the other side, Arnold.*—The letters of orders direct the shipment to be made in a small vessel, to be forwarded by the inland navigation. This is to be understood of the canal navigation, which it was not in the power of the belligerent to put under blockade: A trade carried on with *Holland* in this manner, is not to be considered as a breach of that blockade.

## JUDGMENT.

*Sir W. Scott.*—This is a question arising out of the blockade of *Amsterdam*, respecting goods put on board

The  
SHERIFF.

August 4th,  
1801.

in a port of the *Texel*, for the very purpose of being sent to *London*, without any interruption of the voyage, but conveyed out of *Holland* to *Emden*, by the means of the *canal navigation*, as I understand it. The question is, whether this is to be considered as a breach of the blockade? A blockade may be of different descriptions. The blockade of *Amsterdam* which was imposed on the part of this country, was from the nature of our situation, a mere maritime blockade, effected by force operating only at sea. As far as that force could be applied, it was indubitably a good and legal blockade; but as to, an interior navigation, how is it a blockade at all? Where is the blockading power? Let us suppose the case of the blockade of *Havre*—Can it be said, that, by the maritime blockade of the *Seine*, the interior access to *Havre* is blockaded, so as that goods belonging to a neutral subject sent from *Paris* to *Havre*, could be held subject to confiscation by virtue of the blockade? It is argued, that if this course of trade is allowed, the object of the blockade, which is to distress the trade of *Holland*, will be defeated. If that is the consequence, all that can be said is, that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit of an effectual remedy of this species. This Court cannot, on that ground, take upon itself to say, that a legal blockade exists, where no actual blockade can be applied. In the very notion of a complete blockade it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; and where such a partial blockade

is

is undertaken, it must be presumed that this is no more than what was foreseen by the blockading state, which nevertheless thought proper to impose it to the extent in which it was practicable. The commerce though partially open, is still subjected to a pressure of difficulties and inconvenience: to cut off the power of immediate export and import from the ports of *Holland*, is of itself no insignificant operation, although it may not be possible to exclude them from the benefit of an inland communication. If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited.

In laying down this rule as applicable to the present case, I proceed upon the supposition, that this was a real *inland navigation*, and not a navigation over the *Watt*, the character of which might be subject to a different signification; conceiving this to be a cargo which had gone to *Emden* on neutral account, by an internal canal navigation, where no blockade existed, I shall hold it free of all consequences of blockade; allowing the captors their necessary expences, upon the particular facts of the case.

The  
Stern.

August 4th,  
1801.

August 7th,  
1801.

THE EDWARD, BARTLETT Master.

Contraband Wines from Bourdeaux to Brest, with a false destination, condemned.—The assistance of an elder brother of the Trinity House, requested on the evidence deducible from the entries of the log-book, and the course of navigation that had been pursued.

THIS was a case of a *Prussian* ship, and a cargo of wines, claimed for *Prussian* subjects, taken 16th *June*, 1801, on a voyage from *Bourdeaux*, ostensibly to *Emden*, but found so near to the isle of *Saints*, and with such apparent contradictions in the log-book, respecting the course the ship had held for two or three days before, that the King's Advocate, resting on that point chiefly, to prove a false destination, prayed the Court to request the attendance of one of the Masters of the Trinity House.

On this day, Captain *King*, one of the elder brethren, attended at the request of the Court. It was argued, that, from the entries in the log-book, it was evident the ship was pursuing a course to *Brest*; that this suspicion was confirmed by the evidence of the mariners, who said, the Master stood in for the *French* coast at night, and particularly directed them to say, they were going to *Emden*; that such a voyage with false papers, would make it liable to be considered as a case of fraudulent contraband, affecting the ship as well as the cargo.

The Court desired Captain *King* would state what impression the objections had made on him, as to the course of navigation, and whether the ship appeared to be pursuing a *bonâ fide* course to *Emden*, or whether she was hugging or closing with the *French* coast, so as to make it highly probable, that she was going into a *French* port.

Capt. *King* stated, That with respect to the entries of the log-book, nothing material occurred till the  
10th

10th of *June*, as the course would be nearly the same, whether for *Brest* or *Embsden*; that on the 11th some inconsistencies appeared; but that from the 12th to the 15th the contradictions were such, that they could not have been true entries in point of fact; that at the time when the ship was taken she was standing in for the *Saints*, which was so obviously out of her proper course, that unless the weather had been stormy, which was no where noticed, the Master could not, as a man of ordinary skill, have been found in the situation in which he was taken, if he had been pursuing a course to *Embsden*.

The  
Hewans.

August 7th,  
1801.

#### JUDGMENT.

Sir *W. Scott*.—That will be sufficient to found the judgment of the Court. After this representation, the Court is under the necessity of inferring an intention of going into a *French* port. It appears that there was no reason, why the vessel should have been found where she was described to be; on the contrary, that the ordinary rules of navigation required a different course. The ship had an opportunity of pursuing her voyage; the winds were rather favourable: Instead of pursuing her course she appears to have been hovering about, and adhering to the *French* coast, for which no reason is assigned; there being no cause assigned, I am under the necessity of inferring that it was done without any justifiable cause, and with an intention of getting into a *French* port.

The consequences of this will be indubitable; for though wines are not an article generally contraband *per se*, yet in conjunction with all the circumstances of



The  
EDWARD.

August 7th,  
1801.

of this voyage, they are unquestionably to be considered as naval stores. It was a voyage to *Brest* where there was notoriously a large armament lying, very much in want of articles of this kind, articles of an indispensable nature. If such articles had gone with an avowed destination to such a place, and at such a conjuncture, the rule of pre-emption would have been a rule of excessive and undue indulgence, to apply to such a case ; but where the destination is dissembled, confiscation is the clear and necessary consequence.

It has been said, that this voyage being a voyage from one port of the enemy to another, cannot be deemed a voyage of supply to him ; but it is to be remembered that *Brest* is a port not situated within a wine province of that country, and must have its supplies by importation from other ports ; and the rule has been already established, that the transfer of contraband from one port of a country to another, where it is required for the purposes of war, is subject to be treated in the same manner, as an original importation into the country itself. The vessel so employed, can hardly be considered in any other character, than that of a *French* victualler, carrying to the place of naval equipment, *munitions de bouche* ; and this, with a false representation of her voyage, in order to evade these rights of pre-emption or confiscation, whatever they might be, which would attach upon such a cargo, visibly going upon such a destination.

Under such a state of facts, the ship is involved in condemnation with her cargo.

THE

## THE ZEE STAR, MULLER Master.

August 13th,  
1801.

**T**HIS was a case of a ship and cargo restored by consent, having been taken 9th *July* 1799, on a voyage from *Archangel* to *Lisbon*, The present case came before the Court, on an application for the captors' expences on one side, and for costs and damages, on the part of the claimant of the ship.

Delay of restitution by consent.—Demurrage given.

*Court.*—I perceive the claim was given in this case, on the 10th *September*: The captors consented to restitution, but not till the 30th of *November*: Why had not that consent been given two months earlier? The wrong-doing here is not the original seizure, but the detention. If the papers were brought in, as they must have been before the 10th of *September*, (as it was clearly a case for restitution), why was not consent given before? No explanation is offered of this want of due and necessary diligence. The whole time is two months and twenty days. I shall allow the twenty days for preparing and giving the claim, and considering its effect, and give two months' demurrage.

Costs and damages, and also captors' expences, refused.

THE

August 13th,  
1801.

### THE ABIGAIL, HAMMOND Master.

Monition  
against the  
master, and the  
owner of a pri-  
vateer, not com-  
missioned  
against the  
*Dutch*, to bring  
in the proceeds  
of a *Dutch* prize,  
and shew cause  
why it should  
not be con-  
demned as  
droits of Ad-  
miralty.—  
Prize con-  
demned, as  
droits.

**I**N this case, the King's Advocate moved the Court to grant a monition against *S. Every* the master, and *S. Smith* the owner of a *Liverpool* privateer, to bring in the proceeds of a prize taken from the *Dutch*, and condemned at *Jamaica*, or to shew cause why they should not be brought in and condemned as a droit of admiralty; on a suggestion that the capturing ship had not, at the time of capture, a letter of marque against the *Dutch*. The Court said it was a new and singular case, and required some consideration.

On the next day, the Court directed the monition to issue against the parties, to shew cause why condemnation should not pass to the crown as of a droit of admiralty; and also a monition to bring in the proceeds.

On a subsequent day, 29th *May* 1802, one of the persons against whom the monition to bring in the proceeds was directed, appeared, and acknowledged that they had no commission; but prayed to be admitted as joint captor. The cause was put down, to be argued on his petition, but on its being called, the Court said:—This is not *now* an arguable case: The person admits that he had no commission. It is, therefore, impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services that he has performed, they must be represented to the Admiralty. The former proceedings on the part of the non-commissioned captor, are mere nullities; and the property must be proceeded against as droits of admiralty.

THE

## THE RUCKERS, CAREY Master.

(Instance Court.)

November 4th,  
1801.

**T**HIS was a case of a civil suit, instituted on the part of a passenger against the master, for assaulting him on the high seas, during a passage from the *West Indies* to *England*. A warrant had been taken out against the master, on which he had been held to bail (a).

Cause of damage, personal assault by the master against a passenger, objection to the libel.—Libel admitted.

A libel being now given in, *Robinson* objected on the general nature of the suit—That it was not a suit which the Court of Admiralty would entertain; that personal injuries were things of so vague and indefinite a nature, that they seemed scarcely to admit of valuation, by any other mode, than the verdict of a jury; that they were matters peculiarly fit to be settled by a jury, as was said by Mr. *Dunning*, in the case of *Le Caux* (a) and *Eden*, ‘That the Court of Admiralty could not proceed to estimate personal sufferings, and assess a compensation for them, without the intervention of a jury, to whom that discretionary jurisdiction is exclusively intrusted by the constitution of the country.’

(a) 2 Douglas Rep. p. 597.

It was said farther, that if torts are sometimes spoken of in the Black Book of the Admiralty, as matters to be redressed by the Court of Admiralty, they were as matters of criminal proceeding, in which the Admiral might have had a jury to assist him (a).

On

(a) The bail that had been taken in this case, was ordered to be reduced to 300*l.*; the plaintiff having laid his damages only at 300*l.* 200*l.* or at least 100*l.*

(a) It is sometimes supposed, that the practice of the Court of Admiralty

The  
RUCKERS.

November 4th,  
1801.

*On the other side, Sewell denied there was any incompetency in the Court to estimate personal damages sustained*

(a) *Spelman's*  
*Adm. Juris.*  
p. 217. 221.

Admiralty of this kingdom has been derived entirely from the Civil Law, without holding or acknowledging a common interest in the municipal usages customs or institutions of our own Country. If the fact were, as stated by *Spelman* (a), "that the jurisdiction of the Court of Admiralty was exercised by the Kings of *England* in their household, with the assistance of the Judges of the Common Law, till the reign of *Edw. 3.*;" it would be a sufficient refutation of such an hypothesis.—If it be otherwise, however, there will still be abundant reason to suppose, that the principles on which the jurisdiction of the Admiralty was founded, were perfectly consonant to the principles of our municipal jurisprudence, and derived from the same sources. The *Roman Law* afforded no model from which such a system could be borrowed, nor would it be easy to assign to it distinctly any other foreign origin.

Under the foregoing common but mistaken notion, it is not unfrequently said, 'That the Court of Admiralty, proceeding according to the Civil Law, was at all periods a stranger to the use of Juries.' Ancient records in the Admiralty shew, that Juries were summoned to the Admiralty sessions, prior to the stat. 27th *Hen. 8.*, c. 4.—It is indeed observable on that statute, that the want of juries is not enumerated in the preamble, amongst the defects to be remedied, neither does the enacting clause respecting jurors, describe them as *introduced* by that statute, but only "what Jurors shall be used," viz. those of the district where the Court is held, without regard to the locality of the offence. The constant mention of Juries, in the Black Book of the Admiralty, in all matters relating to criminal proceedings, will serve also to correct this misapprehension. "*Si un homme est endite qu'il a batu une personne, ou qu'il est un commun bateur et malfaiseur en eau salee ; en tel cas, s'il est convaincu par 12, il sera emprisonné par 21 jours, et plus il fera fin au Roy.*" Bl. B. Ad. Art. 12. So, in a subsequent book, the use of a jury is described in terms more applicable to civil matters. "*Porrecto libello, et eidem responso negative per partem ream, de consuetudine judex potest procedere, ad decidendam causam per patriam. Et tunc judex decernat mandatum emanare, de venire faciendo 12 probos et legales homines*

sustained by a passenger, more than in the ordinary case, of mariners proceeding in this way. The statutes *Richard 2d (a)*, and *Henry 4th (b)*, which chiefly restrict the jurisdiction of the Admiralty, leave to it all contracts and *quereles*, arising at sea.

The  
RUCKERS.

November 4th,  
1801.

(a) 19 Rich. 2.  
St. 1. c. 5.

15th Rich. 2.  
c. 9.

(b) 2 H. 4. c. 11.

*In reply*, *Robinson* said, that the master was anxious only to obtain a speedy decision, and was by no means desirous to avoid a hearing in the Court of Admiralty; but that, as it appeared doubtful whether the Court would proceed in such a cause, it was proper that the objection should be taken.

*Court.*—It is a matter of importance, on which I should wish the Registrar to look into the records of the Court.

On a subsequent day, the registrar reported, that he had searched the records of the Court as far back as 1730; that many instances were to be found of proceedings on damage, on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship; and several, against persons belonging to other ships (c); that there were other instances of proceedings on the part of *A. B.* against *C. D.*, without any specification of the capacity in which the persons stood.

(c) Probably sailing in company, and accidentally coming on board.

#### JUDGMENT.

*Sir W. Scott.*—In this case, the person bringing the action is described as a passenger, and the action is in a cause of damage. The question will be, whether

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*homines de vicineto partium predictarum, rei noticiam melius obtinentes, certo die et loco judiciali coram eo, ad dicendum inter partes, quicquid eis constiterit, et super veredictum, dictorum duodecim debet iudex conferre sententiam.*" p. 169.

the

**The  
RUCKERS.**  

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*November 4th,  
1801.*

the Court of Admiralty can refuse its aid? Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this Court. At the same time, I should be unwilling to entertain an action of this sort on such a mere general principle, if it did not appear to be sanctioned by the pre-existing practice of the Court. If in the research which has been made, it had appeared that the precedents had been only such as related to persons in the capacity of mariners, I should have been unwilling to appear to extend it, though perhaps unable to assign any legal ground for such a limitation. But since the Registrar has reported several instances, in which the Court seems to have proceeded in causes of damage, between persons who were not connected by any relation, arising from official situations on board the ship, I am not enabled to say, that the Court can refuse to receive the libel.

*Robinson* then objected to several articles of the libel, as pleading matters rather of a criminal nature, and between other parties, viz. 'That the master endeavoured to suborn evidence of the mate to swear against the plaintiff threatening to take away his life if he refused to comply.'

*Court.*—Those articles must be rejected, as not proper to be introduced in a civil proceeding.

Libel admitted with alterations.

In the event, the party complainant, upon publication of the evidence, declined to proceed farther, and payed the costs of the master.

THE

THE ISABELLA JACOBINA, SOVERGREN  
Master.

October 13th,  
1801.

**T**HIS was a case of an application on the part of a *Swedish* ship, for freight under a charter-party, to go from *Plymouth* to *Radstow*, there to take a cargo of pilchards to *Venice*. The ship had sailed to *Radstow*, and had taken in her cargo, and had proceeded a few days on her voyage, when she met with bad weather and became leaky, and returned to *Falmouth*. After a few days, the *Swedish* embargo was imposed, the cargo was unlivered, and restored to the owners, they being *British* merchants.

Freight of a  
*Swedish* ship  
detained under  
the embargo,  
not given, under  
the circum-  
stances.

*Court.*—I am of opinion, that no freight is due. There could be no pretence for demanding any part, except for that little time whilst the ship was at sea, before her return to *Falmouth*; which place is so much in the neighbourhood of *Radstow*, that it may be taken as the port of her departure. On her return, the *Swedish* embargo took place, rendering it impossible to fulfil the contract of affreightment. The cargo could not wait till the embargo might be taken off; being *British* property, it was restored. I am of opinion that no freight is due. If any expenses have been incurred by the ship on account of the cargo, they must be paid, after they have been first referred to the registrar and merchants.

THE



October 28th,  
1801.

### THE FORTUNA, GERRITS Master.

Salvage on recapture by non-commissioned persons, &c.—Delay in executing the commission of appraisement and sale.—Monition and attachment against commissioners.

**T**HIS was a case of recapture of an *English* ship, with a *French* cargo on board by non-commissioned persons.

The Court decreed the ship to be restored to the former proprietor, on payment of one-sixth salvage; and gave the whole of the cargo, being of small amount, to the captors.

In the course of the proceedings, It appearing that the commission for appraisement and sale had not been returned for two years—The Court directed that a monition should issue with an attachment embodied, and at the expence of the commissioners.

October 28th,  
1801.

### THE TRITON, TRIP Master.

Case of costs and damages.

**T**HIS was a case of a *Hamburgh* ship, and a cargo belonging to merchants of *St Thomas*, taken 13th June, 1798, on a voyage from *St. Thomas* to *Altona*.

#### JUDGMENT.

*Sir W. Scott.*—This ship was coming on a voyage from *St. Thomas* to *Altona*, fully documented for such a voyage; the bill of lading did not express account and risk, but the other papers did; the depositions of the master, and of the mate, expressed the fullest belief of property. But the captors have picked up a Jew passenger, on whose evidence alone it is attempted to discredit this claim. These depositions seem, on the face of them, to have been strangely taken; without them, the case would have been perfectly

fectly clear. It being a case of a voyage from *Saint Thomas* to *Altona*, both neutral ports, without any doubt on the destination, and without any sufficient ground of seizure, I think the claimants are entitled to costs and damages.

A month's demurrage given to the ship.

The  
Tarrow.  
October 28th,  
1801.

THE JONGE PIETER, MUSTERDT Master,  
And three other ships.

Nov. 13th,  
1801.

**T**HIS was a case respecting the legal proprietary interest in certain articles, purchased in *England*, by *Chr. Court* and Co. and shipped by them for *Embden*, with directions, that they should be sent on to *Amsterdam*. The goods were claimed as the property of *J. Court*, a merchant in *America*, and it was said, that the transaction was conducted by *Chr. Court* and Co. in *London*, as agents for *J. Court*, in *America*; that they had been in the habit of originating speculations of this sort, and of carrying the profit to the account of *J. Court*, to liquidate a debt due from him to the house in *London*.

A case of Property, claim not supported by documents applying to the time of shipment. Condemnation.

*On the part of the Captors, the King's Advocate and Sewell.*—The articles in question were shipped in this country, with a final destination to *Holland*: from which a presumption arises, that the property is either in the shipper or in the consignee. The papers, and the rate of insurance, strongly support the suspicion, that they belong to the enemy's consignee; since the insurance is made at a war risk, which would scarcely have been done, if the parties could have relied on the protection

*The*  
*Jesse Pister.*  

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*Nov. 13th,*  
*1861.*

protection of a neutral character. The bill of lading states only, "that they were shipped for neutral account;" and the Master to the 12th interrogatory deposes, "that he does not know who is the owner." There is, therefore, so far no appearance of an *American* interest. The whole evidence pointing to that quarter, is the affidavit of the shipper, which has been introduced, stating, "that these goods were shipped for *J. Court*," and some accounts are produced to confirm this representation. On these accounts it is observable, that no charge is made for this shipment, which is a charge an agent would not naturally have omitted. If the property was actually belonging to *J. Court*, it must have been in their power to shew, that it was debited to his account, or that advice was sent to him of such an interest, or at least that notice was sent to the consignee. As the case is now left, it stands only on the assertion of the shipper. On the fact of property, farther proof must at any rate be necessary to support the claim. But supposing this cargo to be actually the property of *J. Court*, a question of law arises in respect to the destination, which seems to have been absolutely fixed for *Holland*, in violation of the blockade then existing.

*On the part of the Claimants, Laurence and Swabey.*  
—With respect to what is said of the rate of insurance, it is to be recollected, that the *French* cruisers, at that time, seized all property belonging to *American* merchants, and therefore no argument arises from that circumstance, to shew that the goods in question did not belong to neutral merchants. The same fact serves to explain, why it was not thought safe to specify

cify the account and risk of *J. Court*, but to rest only on a general neutral description. The accounts which have been exhibited, shew that the transaction was debited to *J. Court*; and so conscious were the shippers, that it belonged actually to neutral merchants, and not to themselves, that on making application at the Council Office for a licence, and on being told, that it was not necessary for neutral goods, going to *Embden*, to obtain a licence, they desisted, and did not take one. On these grounds, it is submitted, the property is to be considered as vested in the *American* merchant. On that supposition, what is there to impeach the legality of the trade? It is said the destination was ultimately to *Holland*, then under blockade! But not in this vessel, nor on the present voyage. The present voyage was to end at *Embden*; the insurance was made only for *Embden*. The probable ulterior destination to *Holland* must be considered, as a *new* undertaking, and the illegality attaching on such a course of trade, as residing only *in intention*, and not amenable to any penalty, in the present stage. The illegality might be extinguished by new orders; the intention might be changed. That the *interruption* of a voyage, illegal as a *continued voyage*, will defeat the *illegality*, is evident from cases already determined. In the *Polly, Laskey* (a), a voyage from the *Spanish* colony to *Europe*, intercepted by a landing and paying duties in *America*, was held not to be illegal. In the *Stert, Johnson* (b), where the voyage was the direct converse of the present destination, goods ordered to be sent from *Holland*, during the blockade, to

The  
JONES PIERCE.

Nov. 13th,  
1801.

(a) *supr.* vol. ii.  
p. 361.

(b) *supr.* vol. iv.  
p. 65.

**The  
JONES PISTON.**

Nov. 19th,  
1801.

*Embden*, with an original order to send them on to *London*, were restored.

*King's Advocate*.—That was by inland navigation.

*Laurence*.—I am not aware that that makes any difference; but if it could, there is no reason to conclude that these goods would not have gone in that course: as long as there was a practicable way, by which they could be sent innocently, they are entitled to the benefit of the presumption, that they would have gone in that course.

#### JUDGMENT.

*Sir W. Scott*.—These four cases stand on one common ground, being shipments of goods made in *London* for *Embden*, and, as it appears in the papers, with an ulterior purpose of sending them on to *Amsterdam*.

The whole case turns on the question of property.—It is contended on the part of the captor, that the property is either in the shipper, or in the *Dutch* consignee. On the other side, it is insisted, that the goods belong to *J. Court*, an *American* merchant, resident in *America*, for whom the claim is given. According as this point shall be determined, very different consequences will follow. If they could be shewn to be the property of the enemy, they would be liable to confiscation on every ground, and without hesitation. But as that suggestion is principally founded on an expression in a letter, which is, I think, too equivocal to support such a conclusion; and as there are very strong circumstances in the farther  

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proof

proof to shew that the property is not to be assigned to the *Dutch* consignee, that supposition may be dismissed out of the cause. Then it comes to this question—Whether the property is to be taken, as residing in the *English* shipper, or in the *American* merchant for whom it is claimed? If they are the goods of the *American* merchant, the only question will be, Whether, *Amsterdam* being under blockade, such a trade is not liable to the penal consequence of breaking the blockade? If they are the property of *English* subjects, the same question will arise; and also, an additional question, Whether, on their part, it is not such a circuitous trading with the enemy as will make the property, on that ground, liable to confiscation?

The  
JAMES FINNEY.  
Nov. 13th,  
1801.

On the first point, supposing the cargo to be *American* property, I am not inclined to think that it would be affected by the blockade, on the present voyage. The blockade of *Amsterdam* is, from the nature of the thing, a partial blockade, a blockade by sea; and if the goods were going to *Embsden*, with an ulterior destination by land to *Amsterdam*, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade. But in the case of a *British* subject, shipping goods to go to the enemy, through a neutral country, I am afraid the penalty *would* be incurred. Without the licence of government, no communication direct or indirect can be carried on with the enemy. On the policy of that law, this is not the place to observe; it is the law of *England*; and if any considerations of mercantile policy interfere with it, the duty of the subject is to submit his case to that authority of the Country, which can legalize such a trade, looking to all the

The  
JONAS PIETER,

Nov. 13th,  
1801.

considerations, of political as well as commercial expediency, that are connected with it. But an individual cannot do this ; he is not to say, such a trade is *convenient*, and therefore *legal*; neither can the Court exercise such a discretion. Where no rule of law exists, a sense or feeling of general expediency, which is in other words common sense, may fairly be applied: But where a rule of law interferes, these are considerations to which the Court is not at liberty to advert. In all the cases that have occurred, on this question, and they are many, it has been held indubitably clear, that a subject cannot trade with the enemy, without the special licence of government. The interposition of a prior port makes no difference ; *all* trade with the enemy is illegal ; and the circumstance, that the goods are to go first to a neutral port, will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be. I can have no hesitation in saying, that during a war with *Holland*, it is not competent to a *British* merchant to send goods to *Embsen*, with a view of sending them forward *on his own account* to a *Dutch* port, consigned by him to persons there, as in the course of ordinary commerce.

The case is reduced, then, to the simple question, Whether these goods are the property of the merchant in *America*, or of the British subject ? It is said, on the part of the shippers, *Eden* and *Court*, "That they purchased, not for themselves, but as agents of Mr. *J. Court*, and that the goods were going as his property." As far as the property is represented in the papers, it is described "for neutral account ;" a mode of description not unfrequent, I think,

think, in shipments from belligerent countries, but *a general mode*, that points to no designation whatever; under such a description no person can say that the cargo belongs to him, or can entitle himself to take possession of it as his property. This being the state of the original evidence, farther proof was ordered. On seeing the nature and complexion of the case, that it was one in which, if the parties had acted erroneously, they appeared to have acted innocently, the Court felt a disposition to shew every indulgence: But it is not in the power of the Court to turn away its eye from the material question—In whom is the property to be considered as legally vested? The account given on the part of the shippers, is, “That it was purchased under a general agency; that the bill of lading, stating neutral account, *was* intended to apply, and *had* in several instances been applied, to *Court of America*; and that they considered it as a shipment made for his account.” Some observations present themselves on this power of attorney: *Court* and *Eden*, carrying on a considerable trade, as merchants of this city, on their own account, state themselves to have become general agents to trade for another person, under this power of attorney. Looking at the instrument itself, I should find considerable difficulty in allowing that it could convey any such authority. It is addressed to *Christopher Court* only: “I do appoint *Christ. Court, &c.*” A power of attorney is a matter of personal trust; and I am at a loss to understand how, under this appointment, Mr. *Eden*’s name could be introduced, or how the house of *Eden* and *Court* became jointly associated in the business, that was to be transacted under it.

But

The  
JAMES PISTON.

Nov. 19th,  
1801.



The  
JUDGE PIERCE.

Nov. 13th,  
1801.

But do the terms go to the extent of this transaction? They empower "to receive monies," and execute those offices which are usually entrusted by a power of attorney; but I see nothing that can authorize the agent to originate new speculations. It is impossible to contend, that *J. Court*, in *America*, would be bound to ratify and confirm, under this power of attorney, all the speculations in which these persons may have engaged nominally for him, and to any extent. This power of attorney contains no such delegation of authority, but is of a much more restricted nature.

But it may be said, that such a *practice has existed*, and that the necessary authority has been engrafted, by habit, on this power of attorney, under which the house of *Eden* and *Court* have actually carried on trade in this manner for *Mr. J. Court*. Taking it that there could have been such a relation subsisting between them, the question will still remain, Whether the present transaction is to be appropriated to the agency account, or to themselves? *Prima facie*, a merchant is to be taken as acting for himself: If a person *is not* a merchant, that may give a qualified character to his acts; but if a *merchant* appears carrying on a considerable trade, his acts are, *prima facie*, to be considered as for his own account. It is scarcely possible that *such* a state of things should exist, as that business should go on, without making any appropriation, till the matter is over; and that when the rights of some third person have intervened, the agent should then have the liberty of declaring in what capacity he acted. Between the parties themselves, *it cannot be* that the agent should have the liberty

liberty of doing this, by which he might take all lucrative transactions to himself, and appropriate all losing adventures to his principal. If this would be an absurd state of things between the parties themselves, it becomes more unreasonable, that such a liberty should be allowed, when the rights of other persons interpose.

Then the first question is to inquire, Whether any thing had passed, that appropriated this property to either character, at the time when the transaction took place? Looking to the insurances, I perceive they are made in general terms, "for neutral account," and do not in any manner express the property. The next document is the bill of lading, which is not more specific; the same description of neutral property is continued in that also: It is by no means such a document as would entitle *J. Court* to take possession of this property, neither could the shippers bind it down upon him, if he was disposed to disclaim it. The only account that is given of this transaction, which in any way attempts to explain its nature, is to be found in the affidavit of Messrs. *Eden and Court*: they state, "That before the rupture between *France* and *America*, they were used to specify the account and risk of *J. Court*; but that after that time, when it became unsafe that *American* interests should be held forth ostensibly, they introduced the general terms 'neutral account' only; and that since that alteration, several shipments, made for neutral account, have been carried to the account of *J. Court*." I have no doubt that this representation is affirmatively true; and that such a change and alteration did take place, and coincide with the circumstances to which it is attributed.

*The*  
*Jones Piracy.*  
Nov. 19th,  
1801.

**The  
JONES PRINTER.**

**Nov. 19th,  
1801.**

tributed. But the main question is, Whether, since that time, they *have not* made shipments in the same manner, which have *not* been carried to his account? I did hope that some extract would have been produced to shew in what character this particular transaction commenced; for it could hardly be, that both these departments of business were carried on in the same manner; and that in the same record, if I may so say, of merchants' account-books, transactions so different, as those carried on for their own house, and for another house, should be entered without any note to shew, in what capacity the respective shipments were made. It would have been satisfactory to the Court to have received proof of this nature; and it was natural to expect that some such proof would have been produced. If any thing of that kind had appeared, though open to slight objections, I should have held it entitled to the utmost equity of interpretation that the Court could indulge; but no such means of discriminating have been afforded to me. The whole is left on this general representation. There are no orders exhibited *from America*, nor any advice *to America*; there are no appearances that the goods were entered as the property of Mr. J. Court; nor any thing in the books of the shippers to restrain them from taking the shipments to their own account. This being the state of the case, I feel myself under the necessity of saying, that the property is not shewn to have been legally divested out of the *British* house, and that, as their property, it is taken in a course of commerce which makes it liable to confiscation.

THE

## THE POTSDAM, GERTS Master.

Oct 20th,  
1801.

**T**HIS was a case of a ship taken on a voyage from *Cherburg* to *Caen*, 27th Aug. 1801, and claimed for Mr. *Abegg* of *Emden*. It appeared in the history of the ship that she had been transferred from another neutral merchant to the present claimant, whilst lying in *Havre*, then under blockade; and that she had sailed out of the blockaded port in ballast.

Blockade.—  
Ship transferred in a blockaded port, between neutrals, no cause of confiscation.

It was argued, that the claimant could not sustain a title derived under a purchase in a blockaded port.

## JUDGMENT.

Sir *W. Scott*.—It was a transfer from one neutral to another, in no manner connected with the commerce of the blockaded port. I am not disposed to think that circumstance will affect the title; the ship appears to have come out in ballast (*a*), and therefore I think the claimant's title stands clear of all objection on the ground of blockade.

Restored, paying captor's expences.

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(*a*) So in the *Juffrow Maria Shrader*, a quantity of goods sent into *Havre* in 1797, before the blockade, for the purpose of being sent on to *Paris*, and sold for the account of the consignor, but *reshipped*, (as found unsaleable,) by order of the neutral proprietor during the blockade, were restored: the Court saying, "As the truth of this representation is not impeached, these goods are, I think, entitled to restitution. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also, with equal justice, to merchandize sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor."

THE

Nov. 7th,  
1801.

THE BREMEN FLUGGE, MEYER Master.

*Expences of the neutral master do not stand on the same ground as freight, decreed to be a charge on the cargo; expences postponed to the expences of the captor, where he had obtained condemnation of the cargo, and was entitled to an indemnification, for the expences incurred by him.*

**T**HIS was a question respecting the remaining proceeds of a cargo, which had been condemned for want of farther proof; the ship having been restored as a neutral ship, with freight and expences, decreed to be a charge on the cargo. The sum of 1050*l.* had been paid in discharge of the freight, and the question now was, whether the neutral master was entitled to the remaining sum, being not more than 50*l.* under the decree for his expences; or whether the captor had not a prior claim to it, to defray the expences which he had necessarily incurred.

*On the part of the claimant, Laurence contended,*—That the neutral had a right to his freight, in the first instance, as a lien attaching on the cargo at the moment of capture; and that he was farther entitled to the expences of adjudication, to which he was brought by the captor without any justifiable cause.

JUDGMENT,

Sir *W. Scott*.—This is a question concerning a remnant of a cargo, left in the registry, which has been condemned for want of farther proof, after the neutral owner of the ship had obtained a sentence of restitution of the vessel, with freight and expences, decreed *to be a charge on the cargo*. It is true such a decree passed; but this decree of freight and expences, is not to be taken as exclusive of all farther orders of the Court respecting the cargo, nor as giving

ing a decided preference of payment, to the exclusion of other just claims upon it, if the fund should prove insufficient to satisfy all demands. On general principles, when condemnation has been obtained, the captor's claims appear to have rather the advantage. It has heretofore been a question of doubt, whether the neutral vessel can lawfully carry the property of a belligerent at all. The modern rule, *and indeed an ancient rule of this country*, has been established on more liberal principles ; and it is now held, almost universally, that the neutral *has* a right to carry the property of the enemy, but subject to the *right of* the belligerent, to bring in the ship so employed, for the purpose of bringing the cargo to adjudication. It is *now*, I say, generally held, that a neutral vessel so engaged, is not exposed to any penalty at all, but that she is entitled to her freight, as a lien attaching on the cargo. The captor takes *cum onere*. The freight attaches as a lien, which he must discharge by payment, provided, as it must always be understood, that there are no unneutral circumstances in the conduct of the ship, to induce a forfeiture of this demand, But the *expences* of the neutral master, appear to me to stand on a somewhat different footing. As to them, this distinction seems to present itself, supposing the law to be, that the neutral ship is liable to be brought in ; if she can carry the property of the enemy lawfully, on that condition only, I do not know that she is entitled to the expences incurred in consequence of being so brought in. Putting practice out of the question, which has established an indulgent rule, it does not appear, that the neutral master would, on principle merely,

The  
Barrister.  
Nov. 7th,  
1801.

**The  
BREMEN.**

**Nov. 7th,  
1801.**

merely, be entitled to an indemnification for expences so incurred. He is bound to know the condition annexed to his right, and to abide the consequences. A more favourable practice has obtained, under which his expences are usually allowed ; and this practice the Court will be disposed to sustain, as far as it does not interfere with other rights, equally protected by practice, and more strongly protected by principle. But it is not a claim, which the neutral master is entitled to urge against the captor, as a right equally original, and equally vested in him, and in the same manner, as freight is vested, by the receipt of the cargo on board, and the performance of the contract of conveyance.—It is said, that the cargo was condemned, not as enemy's property, but for want of farther proof, and the attestation of the asserted owner : Can that make any difference ? The legal conclusion will be the same, that condemnation passed, because it was not proved to be the property of the neutral claimant ; the want of proof of neutral property induces the legal conclusion, that it is the property of enemies. The captor is as much entitled, as if the cargo had been condemned on affirmative grounds, and in the first instance on positive evidence, that it was the property of the enemy. On these considerations, I think the captor is entitled to the priority.

The money decreed to be paid to the captor.

**THE**

## THE ALEXANDER, AGES Master.

Nov. 19th,  
1801.

**T**HIS was the case of a cargo, taken 3d April 1801, on a voyage from *Lisbon*, ostensibly to *Altona*, but actually going into *Havre*, during the blockade, under pretence of being in want of provisions. The goods were claimed for several persons, merchants of *Lisbon*. The ship had been condemned on a former day: It was argued now, on the part of the claimants of the cargo, that they were not bound by the act of the master, *deviating* into a blockaded port; and it was prayed, that they might be permitted to give farther proof.

Deviation into a blockaded port, presumed to be in the service of the cargo.—Presumption leading to the condemnation of the cargo.

## JUDGMENT.

Sir *W. Scott*.—I think this case is in effect decided by the decree, which has pronounced the ship subject to condemnation, for fraudulently attempting to go into a blockaded port; for when the Court decided *that*, it did in effect decide, that the vessel was so going to dispose of this cargo, the inference in all cases being, that a ship going into a blockaded port is going with an intention of disposing of the cargo. The Court has already decided, that the ship was going in, and that the excuse assigned was a frivolous pretence. The master makes no distinction, nor asserts that he deviated under particular directions, applying to one part of the cargo only, or that when that part was delivered, under instructions unknown to the rest of the shippers, he was to go on to *Altona*, with that part of the cargo, which is the subject of the present



The  
ALEXANDER.

Nov. 19th,  
1801.

present claims. If that could have been made out, the Court might, perhaps, have given the claimants the benefit of that distinction. The same general cause is assigned for all, and I must suppose the whole cargo was to be there delivered. It is true, that the owners of the cargo are not, in general cases, held to be affected by the act of the master, unless he is specially appointed their agent: But it would be impossible to maintain a blockade in cases of this nature, which is directed more against the cargo, than against ships, if the Court did not draw the inference, that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner. If any inconvenience arises to the claimants of the cargo, from this necessary conclusion, the owners of the vessel, or the master, are the persons to whom they must look for indemnification.

Cargo condemned.

Jan. 19th,  
1801.

THE GUTE GESELLSCHAFT MICHAEL,  
KOLTZENBERG Master.

Hemp of an inferior quality, Cordilla hemp, reported not fit for naval purposes—not contraband. Restored, paying captors' expenses.

**T**HIS was a case respecting a cargo of hemp, taken 5th May, 1800, on a voyage from *Lubec* to *Bordeaux*, and proceeded against as contraband.

*On the part of the claimant*, it was contended, that this hemp did not come under the description of contraband, being, in fact, not fit for naval purposes, but a coarser sort, usually denominated *torse* or *cordilla* hemp.

A reference

A reference was directed to be made to the officer of the King's yard at *Woolwich*.

The  
GUTH GIBBELL-  
CHAFF MI-  
CHEAL.

On this day, a certificate was exhibited under the affidavit of *G. Gainer*, late clerk of the dock yard at *Woolwich*, and *J. Barker* rope-maker, stating, "that the specimens referred to them, were cordilla hemp of a most inferior quality, and by no means fit for making rope or cordage for the use of his Majesty's navy, or the merchants' service; that on account of its inferior quality, it is in *England* prohibited by act of parliament, from being made into rope for the use of ships; that they cannot say, whether it would be used in foreign countries for making cordage for the use of the shipping; but that the same is by no means fit for such a service, nor would it be safe to trust to cordage made therefrom."

Jan. 19th,  
1801.

On this affidavit, the cargo was directed to be restored on payment of the captors' expences. (a)

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(a) In a subsequent case, the *Jonge Hermanus*, where the value was represented as too small to bear the expences of the captors, The Court said, Torse is so like hemp, that if it is permitted to be carried without examination, the enemy would be very well supplied with hemp. It is necessary that such cargoes should be brought in for examination.

Captors' expences given.

THE

Nov. 18th,  
1801.

### THE VRIENDSCHAP, GOVERTS Master.

Licence to the port of the enemy for enumerated articles. Other articles not inserted in the licence, sent at the same time, on the part of the British subject, subject to condemnation, notwithstanding an ulterior destination to a neutral port.

**T**HIS was a case respecting a quantity of barilla sent from *London* to *Rouen*, in the first instance, but with an asserted destination to *Oporto*, and claimed on behalf of a *British* merchant.

It appeared, that the claimants had obtained a licence to export certain enumerated articles (*a*) to *Rouen*, but the barilla was not included in the licence. It was represented on their part, that it was not the intention to unlade the barilla at *Rouen*, but that after the privileged part of the cargo had been delivered there, the ship was to go on with the barilla to *Oporto*.

*On the other side, the King's Advocate and Robinson* contended—That there were several circumstances in the facts of this case, which made the reality of such an intention liable to great suspicion, and wholly incredible; but farther that, in point of law, it was not competent to a *British* merchant, to send goods unprotected by licence, to an enemy's port, under a purpose of sending them on, upon an ulterior destination to a neutral port.

#### JUDGMENT.

Sir *W. Scott*.—This question arises on a quantity of barilla, shipped at *London*, and taken on a voyage, first to *Rouen*, but as it is asserted, going ultimately to be delivered at *Oporto*; the other part of the cargo being to be delivered, under the protection of a licence at *Rouen*. The first thing to be considered is, Whether it is satisfactorily proved, that the barilla was actually to be delivered at *Oporto*? If not, the Court may

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(a) These articles had been restored by consent.

require

require farther elucidation, or it may think the contrary so clear, that that question of law shall not arise. Upon the nature and quality of the goods, it must be allowed, that the exportation of barilla to *Oporto*, is liable to all the objections of incredibility, that have been urged against it. Barilla is the produce of *Spain*, a country contiguous to *Portugal*; and on that account it is a commodity, which in the uninterrupted state of commerce, that has subsisted between *Spain* and *Portugal*, might be expected to find its way to *Oporto*, by a much more expeditious course, than through this country. It is besides an article in great request in *England* and *France*, and much enhanced in price, owing to our hostilities with *Spain*; our own navigation laws have been relaxed to promote the importation of this very article, owing to the difficulty of obtaining it. This circumstance throws a great improbability on the fact; but considering the great flux and reflux of different articles in commerce, the Court would be unwilling to decide on the mere ground of improbability alone.

With respect to the other parts of the case, it appears, there were two sets of papers on board; one expressing a destination from *Hamburgh* to *Rouen* and *Oporto*; the other stating, that the vessel was going to *Harfleur*. The account which the Master gives of this contradiction, is, "that he took the latter only for the purpose of deceiving *French* cruizers." It is impossible not to observe, that this representation of the Master is very inconsistent; for we should naturally have expected, that if his account was true, he would on being brought to, have presented this paper; since it appears, that he was first impressed with a notion, that he was stopped by a *French* privateer.

The  
VASSINIERE.

Nov. 18th,  
1801.

But he acts quite otherwise, he gives up other papers, but does *not* give up *that* paper; and when he finds that the ship, which had brought him to, was an *English* vessel, he still wishes to hold back *this* paper: The more material fact, however, is, that he does not bring forward this paper, *when only* it could have been of use to him, according to his own account, to protect him against *French* cruizers. How could this inconsistency have proceeded from imprudence only? If it is mere imprudence, it is an unfortunate imprudence, and leaves the fact very questionable, as to a clear and fair intention of going to *Oporto*.

But supposing the ship was really going in this course of trade, a question arises, whether it is such a course of trade as can be allowed? The shipper obtains a licence, which is a thing *stricti juris*, to be obtained by a fair and candid representation, and to be fairly pursued. It is not pretended, that any mention was made of these articles in the application, or that it was at all presented to the view of the Council, that there was an intention of mixing up articles of this nature, for a farther destination to *Oporto*. It was stated to the Council, that the ship was destined to *Rouen*. With the articles enumerated in the licence, would the Council have allowed such an article as this to have gone to *Rouen*, under a certainty of being put in requisition there, if wanted, notwithstanding the asserted purpose of the shipper to carry it on to *Oporto*? Then is this a fair execution of the licence? I cannot think that it is. I am disposed to refer it to the judgment of another Court, which will have the means of ascertaining what would have been the opinion of the Council, on such a course of trade, if it had been fairly disclosed to them.

It

It is certainly a good logical rule, not to argue *ab abusu contra usum*; but if it is clear, that the abuse would be certain, and frequent, and impossible to be prevented in numerous cases which must occur, then the abuse so probable, certain, and so frequent, is a fair argument against the allowance of the practice. If the Court is convinced, that out of a thousand instances, there would be nine hundred and ninety-nine of abuse, in opposition to one fair and *bond fide* execution of such an intention as is here alleged, it is reasonable to conclude, that such a practice would not be permitted. If this could be admitted, what has any *British* merchant to do, but to put articles of any sort on board, under such pretences, and how is it possible to prevent them from going, without molestation, into the hands of the enemy? I think the case alluded to is connected with this, though weaker; *viz.* That, supposing a neutral ship going from *London* to an enemy's port, and on a farther destination to a neutral port, it would not be competent to a *British* merchant to put goods on board, under cover of that ulterior destination. In the case of a blockaded port, could permission be given to any neutral merchant to take goods there, on an *averment* of an ulterior destination? I am of opinion, that it would be impossible to prevent the perpetual abuse of such liberty as is here contended for, and therefore, that the mere honesty of intention cannot be alleged as a justification, in a course of transaction, which, if allowed, would leave no means of preventing fraud, in an infinite number of other cases.

Under these considerations, I am of opinion, that the licence has not been fairly executed, and I shall



The  
VASEWICHAP.

Nov. 19th,  
1801.

refer it to another Court, who compose a part of the Council, to say whether it was the intention of those who granted this licence, that under shelter of such protection, a *British* merchant should be at liberty to put other articles on board, to go first to *Rouen*, under an averment that they were to be carried on to *Oporto*; more especially, when it is notorious how much the manufacturers of *France* have been in want of all articles, and to what violent modes the *French* government has resorted, by seizing them whenever they came into their ports.

Condemned.

Nov. 19th,  
1801.

### THE SECHS GESCHWISTERN, Jobs Master.

Sale of the ships  
of the bellige-  
rent, in time of  
war, not prohi-  
bited by the  
Court of Admi-  
ralty of Eng-  
land: Necessity  
of an entire  
sale: Expedient  
of France, to  
retain the  
equity of a re-  
demption, in  
ships so sold,  
&c.

**T**HIS was a case respecting a ship asserted to have been purchased in *France*, by a neutral merchant, but not wholly transferred.

#### JUDGMENT.

Sir *W. Scott*.—This is the case of a ship, asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of *France*, it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be *bonâ fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that any thing tending to continue his interest, vitiates a contract of this description altogether. This is the rule which this country has always considered itself justified

justified in enforcing ; not forbidding the transfer as illegal, but prescribing such rules as reason and common sense suggest, to guard against collusion and cover, and to enable it to ascertain, as much as possible, that the enemy's title is absolutely and completely divested.

The  
SECRET  
GOSCHWITZ-  
TEIN.

Nov. 19th,  
1801.

In the present case there are covenants which preserve, and retain the interest of the enemy seller. The formal instruments of transfer, rather import some such secret agreement ; for in the account current, which bears date *February* 1800, we find charges for *neutral papers* ; and though the bill of exchange which is asserted to have been given in payment, is produced, and bears the semblance of an actual bill of exchange, no notice is taken of it in this account. With respect to the balance of the account also, as it is termed, there is an agreement by which "the neutral purchaser mortgages the said brig, &c. to Citizen——, deducting the sums received on account."—But there are no such sums charged or entered, as received ; under these circumstances, the ship would stand bound for the whole amount, and it could not be said, that the interest of the former owner is divested. But there is another condition of this contract which more directly points to the continuance of the enemy's interest. It recites, that "whereas the seller is bound in a penalty not to sell, unless under condition of restitution (a), at the end of the war, we bind ourselves to all suits, to

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(a) Nemo potest videri eam rem vendidisse, de cujus dominio id agitur, ne ad emptorem transeat.—Dig. de Cont. Emp. l. 80. § 3. Pothier *Tr. des Oblig.* vol. i. p. 6.

which



The  
SACRE  
GASCHEN-  
TEAN.

Nov. 19th,  
1801.

which the seller may become subject." It seems, that it is the policy of the *French Government* (a), not to

(a) Another expedient for preserving the navigation, of their ships, on the part of the *French government*, by *neutralization* appears to have been thus conducted.

"I, the undersigned, *Peter Backman*, merchant of *Gottenburg*, vested with the powers of Citizen *John Baptiste, Ezekiel Pantreue*, and Co., merchants, residing at *Paris*, promise and engage to the Citizen *Guay*, commissary of marine, exercising the office of Comptroller, in the presence of Citizen *Bertrand*, under-comptroller, to navigate, under the *Swedish* flag, the ship *Mignone*, of 183 tons, according to the conditions of the *arrête* of the 9th *Thermidor* in the year 5, and of the dispatch from the minister of the 28th *Ventose* in the year 8, and to conform to every thing prescribed in this subject. The said ship which I declare to navigate, under the name of the *Walfarden*, shall only trade from *French* ports, or from neutral ports to *French* ports, reciprocally, and not enter any others, without giving a sufficient reason. I promise, besides, to give an account, month after month, to the administration of marine at *Rochfort*, of the navigation and voyages of this ship.

"As a surety for this bail, I submit to pay to the Republic, the value of the said ship, amounting to 19,806 francs 60 centimes, in money, according to the estimation of her value, made the 26th of this month, by the commissioner named for this purpose, in case I should not fulfil all the engagements imposed on me."

(Signed) BACKMAN,  
REDIZ, Inspector General of Marine.

At the bottom of the same exhibit, "the bond is declared null, in consideration of the capture of the said ship by a *Jersey* privateer, and condemnation in the Court of Admiralty of *England*, notwithstanding she was so neutralized."

(Signed) REDIZ, Inspector General of Marine.

DAVID,  
Chief of the Administration of Marine.

allow

allow sales of *French* vessels, without this equity of redemption. From their inability to navigate their own ships during the war, they submit to a temporary transfer ; but still keep their hand upon them, to enforce restitution on the return of peace. From this penalty, the neutral purchaser undertakes to exonerate the vendor.—It is impossible for him to do this, without making himself answerable for the money, for which Citizen *B.* is bound ; in which case, supposing that any adequate payment has been actually made, the neutral must be understood to undertake to pay a double price. Is there in this any sign of a *bonâ fide* transfer ? Is not the hand of the *French* vendor still on the vessel ? Looking to the controul which the *French* government and the vendor still retain over this property, it is impossible for me to hold, that all the interest of the enemy is completely divested.

Ship condemned.

The  
Sloop-  
GUYARD-  
TERR.

Nov. 19th,  
1801.

VROUW MARGARETHA, JACOBS Master.

(Instance Court )

Nov. 23d,  
1801.

**T**HIS was a case of salvage of a foreign vessel, that had run on a sand on the *Essex* coast, and was afterwards brought off, on the flowing of the tide, by the assistance of some fishermen, going out to their relief, and taken on board.

Salvage.—  
Small service.—  
Tender of 50l.  
deemed sufficient. *Tender*,  
not made with  
sufficient precision,  
to save costs.—Rule for  
future practice.

JUDGMENT.

The  
Vrouw MAR-  
GARETHA.

Nov. 23d,  
1801.

## JUDGMENT.

Sir *W. Scott*.—This was a foreign vessel, that had struck upon a sand on the *Essex* coast, from which she was rescued by the master and crew of a fishing smack. It is argued, that *she was in great danger, as the foreign master was entirely ignorant of our coast*. On that plea it must be observed, that mere ignorance of the master cannot in itself be a proper ground of salvage. The Court will never suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who, as foreigners, are of course not very likely to be well acquainted with our coast. The service actually performed in this instance, is almost as low a degree of salvage-merit, as can be presented to the view of the Court: Some service has been rendered, however, and some recompence must be acknowledged to be due.—I think the 50*l.* which, it seems, has been offered on the part of the ship, is fully sufficient. The only question on which any doubt can be entertained, is as to the costs; *viz.* what effect this offer will have on that part of the suit? No blame is imputable to the parties for entering their action. Such a measure would, perhaps, be found generally convenient to all parties, and most conducive to the purposes of justice; since many instances have occurred, in which proceedings have been delayed, under a disposition to compromise, or under agreement to submit to arbitration, which has gone off, and the parties have been obliged to come here at last, at an increased expence, and under a great difficulty in furnishing such evidence as, after a lapse of time, could safely be relied on.

On

*On costs, Swabey and Robinson.*—As the Court has pronounced 50*l.* to be a proper reward, It will not now reduce that recompence lower, unless the adverse party can shew, that the salvors have been in any blame. They entered their action, which the Court has pronounced to be properly done: No tender was made in the form that the law requires, not in acts of Court, nor in writing: the offer, which was made *verbally*, was clogged with a condition of including the salvors' expences, which would very much diminish the reward. A legal tender should be made in a distinct form, and be accompanied with an offer of costs already incurred, in the same manner, as in other plenary causes, such as suits for tithes, or the recovery of mariners' wages. This is a suit in its nature *plenary*, and cannot be altered; although the Court does, for the accommodation of the parties, allow them to proceed by act and petition, supported by affidavits.

The  
VROUW MAR-  
GARETHA.

Nov. 23d,  
1801.

*On the other side*, it was contended—That these were cases, in which the Court encouraged the most simple and summary mode of proceeding; that the offer passed between the parties; and although the tender was not made in the most formal manner, *in acts of Court*, it was substantially the same, and fit to be taken into the consideration of the Court, on a matter so much under its discretion as the question of costs; that the conduct of the salvors, had placed them in the condition of persons, proceeding in a suit *unnecessarily*, after all reasonable demands had been agreed to be paid.

JUDGMENT.

The  
Vrouw MAR-  
GARETHA.

Nov. 22d,  
1801.

## JUDGMENT.

Sir *W. Scott*.—The present question is, whether the Court shall pronounce the salvors entitled to the expences, which they have incurred in obtaining this 50*l*.? They instituted a suit, without any impropriety: Some offer was made, but it is disputed whether it was made in a proper manner, so as to have the effect of a legal tender. It has been said, that the Court has relaxed the form of proceeding in these cases, for the benefit of a speedy conclusion; and so it has. But it has encouraged no relaxation, as to the legal form, in which a tender should be made. If the Court saw any inconvenience that could be likely to arise, or any delay that could be occasioned by requiring a formal manner of making a tender, it might relax on that point also; but it appears to me, that the mode of making a tender in acts of Court, is as summary and easy as any can be. When it is done in this manner, the offer is distinct and precise: The parties know what is proposed to them, for their reward, and what for costs. When it is made verbally, this is unavoidably exposed to the hazard of misunderstanding and uncertainty, and much of this has happened in the present case. Mr. *Baker* who made the offer, made it according to his affidavit, “for their services;” but the act says more, “for services and expences.” Here then the Court is at once thrown into uncertainty, as to the intention of the parties, which never could have happened, if the tender had been made in acts of Court.—As to what is said, that *these are matters of great simplicity*,—Surely, simplicity is much better preserved by stating particulars in an act of Court, than by leaving them  
to

to a floating negotiation, between the parties and their proctors. I see enough of the inconvenience of proceeding in this loose manner, to make it necessary for me to require, in future, as an universal rule of Court, that a tender should be made, in the first stage of the proceeding, in a regular form. The Court will then consider its sufficiency; and if it shall be pronounced sufficient, the Court will make the party who refuses such an offer, liable not only to his own costs, but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued.

In the present case I am under the necessity of saying, that the tender has not been formally and legally made; and that the salvors are entitled to their costs.

The  
Vrouw MARGARETHA.

Nov. 23<sup>th</sup>,  
1801.

THE ANNA CATHARINA, WUPPER Master.

Aug. 3<sup>d</sup>,  
1802.

**T**HIS was a case of a cargo of dry goods, &c. taken October 1801, on a voyage from *Hamburg* to *La Guayra*, and described in the ostensible papers and depositions, "as going to take the chance of the market." By the discovery of a letter, it afterwards appeared, that these goods were going under a special agreement and contract with the *Spanish* government of the *Caracas*.

Colonial trade.—Contract with the Spanish government of the *Caracas*, giving a monopoly of the produce of tobacco of that settlement.—Effect of such a contract. Goods going to become the property of the enemy immediately on arrival.—Condemnation.

On this latter circumstance, the *King's Advocate* and *Arnold* first contended—That it was a case which the Court would not admit to farther proof, after the detection of the *mala fides*, with which the transaction had

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had been conducted on their part.—On this point, The Court said, that it was not every act of disguise-ment, nor every deviation from truth, in the formal papers, that would preclude the parties from farther proof. Being of opinion also, that the concealment of the letter, was not shewn to have been a fraudulent suppression, the Court directed farther proof to be admitted.

It was then contended, that the goods were going under a contract between Mr. *Robinson*, an inhabitant of *Curaçoa*, and the *Spanish* government of the *Caracas*; that *Curaçoa* having fallen under the protection of the *British* government at the time when the contract was carried into execution, it became an illegal contract on the part of Mr. *Robinson*, on the ground of its being the trade, of a person now become a *British* subject, carried on with the enemy. That the contract being illegal in the hands of Mr. *Robinson*, must be held to be illegal also in the hands of Messrs. *Sontag* and Co., who were employed to execute it, under a contract with him; and that the interest of *Robinson* was not even divested, since it appeared that his house at *Curaçoa* was to have one third of the profits. It was farther contended, that the cargo was to be considered as going to become the property of the *Spanish* government on arrival, and therefore to be deemed *Spanish* property: That the nature of the contract with the *Spanish* government, giving a monopoly of the tobacco of those settlements for three years, would also have the effect of impressing on the property passing, under the contract, and on the persons carrying it into execution, the *Spanish* character.

On

*On the other side*, it was contended—That there was sufficient proof of the real property of the house of *Hamburg* in this shipment; that the shippers were perfectly at liberty to adopt the contract first entered into by *Robinson*, without being affected by the law, which made it illegal *for him* to execute such a contract, as a *British* subject; that as to the legality of contracts entered into with the government of the belligerent country, there was nothing in that circumstance to render them invalid, more than in other instances of contracts formed in *Europe*, with the proprietors of colonial estates; in which cases, property had been frequently restored; That it was *not* a cargo going under an absolute contract to become *Spanish* property; the goods were not to be delivered immediately to the *Spanish* government, neither were they *such goods*, as the *Spanish* government was bound to accept; under these contingencies, it could not be considered as a cargo going to become the property of the enemy on arrival, or as coming under the authority of the *Sally, Griffiths* (a).

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(a) Vide *supr.*  
v. 3. p. 300.

## JUDGMENT.

Sir *W. Scott*.—This was the case of a *Danish* ship, going with a cargo of linen, wines, geneva, cheese, &c. from *Hamburg* to *La Guayra*, or *Porto Cabello*, and taken *October*, 1801, in the prosecution of that voyage. A claim is given for the cargo, on behalf of Mr. *Sontag* and Co. of *Hamburg*. Several witnesses have been examined, and, amongst them, the supercargo, who has given not a very ingenuous account. He states in his deposition, "That the cargo was to have taken the chance of the market;" but,  
in



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in the course of the discussion which the cause has undergone, a contract has been produced, on farther proof, which shews that these goods were going under a special agreement, with the Superintendant of the *Spanish* provinces of the *Caracas*, and that it was only on failure of that agreement (an event in no degree in the contemplation or intention of either party) that they were to take the chance of the market. The evidence of the supercargo, to speak of it in the most favourable terms, must be considered as not conformable to the fact. It will be necessary in the first place, to examine the nature of this contract, which now appears to be the foundation of the whole adventure, and may, possibly, very much affect the principles of law, which it will be the duty of the Court to apply to such a transaction.

The original contract was made on the 5th September 1799, between the government of the *Caracas* and Mr. *Robinson*, first described as an *American* merchant (a), but now described, in the papers of farther proof, as having a house of trade, and actually living, at *Curaçoa*. Under this description, he is undoubtedly to be considered as an enemy, at the commencement of this transaction, *Holland* being, at that period of time, the enemy of this country. Whether the property belongs to a *Spaniard*, or a *Hollander*, it is equally condemnable, and

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(a) Under a very general misapprehension, on the part of the *Americans*, in the earlier period of this war, conceiving that they were entitled to retain the privilege of the *American* character, notwithstanding a residence and occupation in any other country.

therefore

therefore it cannot be represented as a contract framed in *fraud* of any rights of war; both parties being at that time equally subject to those rights. It is, however, a contract of a very peculiar, and a very privileged nature, being "for the purchase of *all* the tobacco at present deposited in the government warehouses, at *Porto Cabello*, *La Guayra*, and *Guyana*, to be exported in the course of three years from the port of *Cabello*; to be paid for in flour, and other dry goods and specie; with a condition, that the market should not be, at any one time, over-fed with flour; and with a permission, that importation and exportation should be allowed on the part of the *Spanish* government, *free of all duties*." By a subsequent article, the contract is extended "to *all the tobacco* that should be grown in those provinces during the three years, under a stipulation, that none should be exported, excepting to *Spain*, and that none should be sold to neutral traders, but under the benefit of this contract; and that the goods to be imported should be lodged at the custom-house, before the tobacco should be delivered (a)."

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On the nature of this contract, two questions arise; first, How is the property to be *legally* considered? If the cargo is to be taken as being actually become *Spanish* property, there will be an end of the case; under the rule which renders goods going to a belligerent, to become his property immediately on arrival, subject to confiscation. This is a rule universally applied by this Court, and confirmed by

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(a) The contract will be found in the Appendix.—No. 2.

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the authority of the Supreme Court. A distinction has indeed been admitted, in favour of contracts made before a war, and without any contemplation of war; but if the contract being made before the war, and without any prospect there to, is carried into execution by a shipment after the breaking out of hostilities, the ground on which that favourable distinction is made, no longer exists. The original contract in this case was, as I have observed, originally inoffensive, both parties being enemies. But, on the principle before adverted to, if a party becomes a neutral after the contract, and before the execution of it, and shipment takes place afterwards, *that* also will compose a case, not falling within the reach of the relaxation. By the cession of *Curaçoa*, Mr. *Robinson* became, not merely a neutral, but a subject of this country; and then his contract becoming illegal, ought to have terminated; for, by the change in his civil relations, his legal capacity to execute such a contract was totally extinguished. He, however, is not the person for whom the present cargo is claimed. The goods were not shipped by him, though he was in *Europe*, at *Hamburgh*, at the time, for the purpose of carrying the contract into execution. The shipment was made by Mr. *Sontag*, and other merchants of *Hamburgh*, to whom a part of his contract had been transferred by *Robinson*. It has been argued, that the contract becoming illegal in the hands of *Robinson*, the illegality would travel over with it, and attach on those persons carrying it into execution. I am not disposed to hold, that *it would* affect *them*, as a contract made or executed, *in breach of allegiance*. The immediate shippers are neutral persons, Messrs. *Sontag* and

and Co. of *Hamburgh*, acting under the contract, as it was devolved on them to supply the goods, and receive the return cargoes, in the same manner that *Robinson* was to have done. No duties of allegiance bound them to abstain from a direct commerce with the enemy of this country; and it cannot be inferred that any violation of duties of that species, on his part, could at all be transferred to them, who are neutral merchants, standing indifferent to both parties. But, taking them to be such, how does the character of the goods stand in this transaction? Was it not, in the first place, a cargo going to become the property of the *Spanish* government immediately on arrival? Was not the *Spanish* government entitled to possession? It was only on the violation of the contract, on the part of the *Spanish* government, that these goods were to take the chance of the market. The shippers considered themselves as bound to deliver them for the use of the *Spanish* government, under the agreement; as entitled to the benefit, and subject to the obligations of that contract. Were there any intermediate acts to be done after the arrival of the vessel? Or were the acts such, as would have the effect of substantially distinguishing this case from the *Sally (a)*, *Griffiths*, and other cases? Is there any act

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Supra, vol. III.  
page 300.

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(a) The decisions of Prize Courts on this point are perfectly consistent with the general principles that govern the contract of sale; by which the thing sold, after the completion of the contract, and before delivery, is properly at the risk of the purchaser. *Pothier*, following the *Roman* law, says, "C'est aussi une chose qui est de la nature du contrat de vente, qu'aussi-tot que ce contrat a reçu sa perfection par le consentement des parties, quoiqu' avant la

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act of ownership which the claimant was at liberty to exercise, so as to prevent the delivery? If not, the goods

tradition, la chose vendue soit aux risques de l'acheteur, et que si elle vient à périr sans la faute du vendeur, la perte doit tomber sur l'acheteur, qui ne sera pour cela déchargé du prix; mais comme cela est de la nature seulement, et non de l'essence du contrat de vente, on peut en contractant convenir du contraire." *Trakté des obligations. Part 1. C. 1. § 1. Art. 1. § 3.*

This liberty of forming particular exceptions, is all that is restrained by the law of nations in times of war, for reasons too cogent, and too obvious, to need illustration. The experience of antecedent times, and the practice of different countries, bear testimony to the propriety of such a principle.

So long ago as 1666, we read in Sir *L. Jenkins*, "Those *Hamburghers*, as there are some who favour the *English* trade, make "no difficulty (in order to obtain the attestations in common form) "to swear that those very goods which *Englishmen* do buy in *Hamburgh* with their own money, and which are to be delivered here "in *England* upon the proper and sole account of *Englishmen*, as "soon as they come to safe port, do belong to the *ladars, i. e.* "*Hamburghers*; and that no other person can or ought to pretend "to any interest in them. The way that they save this case of "conscience, (as I have seen them explain themselves in their letters), is by taking the risque of the goods on themselves, while "the goods are at sea, and in danger of the enemy; and for so "doing, they have so much *per cent.*; yet this risque of theirs is "so limited, that it respects no other danger of the sea but that "from the enemies of this crown: so they are bound to no more, "but to use their utmost endeavours and interests to make out a "claim; the loss being the *Englishman's*, if the sentence should by "violent and exorbitant proceedings go against the *Hamburgher*. It "is not improbable but that the *Dutch* and the *French* have like "wise such friends at *Hamburgh* as will lend them their names, and "their consciences too, upon the like terms." Vol. ii. p. 729.

See also the form of the attestation, prescribed by the ordinance of *Denmark*, 1659: "Also, that they do solely go for my own account and risk, and this not in appearance only, or for colour  
"make,

goods must be considered as having substantially become, *in itinere*, the property of the enemy.

Two or three circumstances are relied on, as having the effect of distinguishing this case. It is said, that the goods were to be delivered, *not* to the custom-house, but to *Young* the agent. That alone will not form a material distinction; because if the agent was bound to hand them over to the custom-house, a delivery to him cannot be considered in any other light, than as a delivery to the custom-house itself. If in the *Sally, Griffiths*, an *American* agent had been stationed in *France*, to receive the goods, in the first instance, I cannot think that such a circumstance would have made any difference in the judgment of the Superior Court. Secondly, it is said, that the *Spanish* government might have refused these goods. Certainly, all the letters and papers which disclose this case, rely on the obligation of the *Spanish* government, to receive them. At the same time, it was a possible event, that a distant government, used perhaps to a style of proceeding not unfamiliar to arbitrary governments generally, might find it inconvenient to execute the contract, however solemnly entered into, and might refuse so to do, as it might refuse to execute any other contract into which it had entered. It was therefore but a prudent precaution to guard against the possibility of such a contingency, though it could never

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"sake, so that by means of some clandestine agreement I am col-  
"lusively to cover the said goods, until they are brought in safety,  
"and that then they shall belong to, and be sold for account of  
"enemies." *Collectanea Maritima*, p. 181.

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(a) Letter, 14th  
Oct. 1801.

happen but by a breach of good faith, against which the other party had a right to protest. It is said however on this same point, that these goods do not exactly correspond with the enumeration in the agreement, that *they are not contract goods*; and consequently, that without any violation of public faith, the acceptance of them was merely optional and contingent. But, I cannot think, that it is now open to the parties to make this averment; when it is evident, on the face of their own letters, that they relied on the clear and absolute obligation of the *Spanish* government to take them *as such*. The letters, which are the letters of *Robinson*, describe the goods to be "such as had been before sent under the "contract, and about which no difficulty had been "made (a);" they express a confident expectation that they would be received as such, being no other deviations, than such as had been permitted under the common understanding of the parties, in all former transactions under that contract, and that they could not be rejected, but under an act that would amount to a total surrender of national faith. After this, the parties are not at liberty to say, "*they are not contract goods*," any more than the claimant in the *Sally, Griffiths*, could have been heard to aver that the flour was not of that quality which that contract required. These distinctions are, in my judgment, totally insufficient to take the case out of the authority of the precedents that have been alluded to. Where the goods are sent under a contract by the party, it surely cannot be permitted to the claimant himself to aver, that the goods so sent are not contract goods. In all such cases, whether expressed or not, it is the common understanding

understanding of the parties, that the goods to be entitled to the benefit of the contract must answer the description ; and it shall not be permitted, that he who sends the goods with such a claim, shall be heard to maintain that they do not answer such a description. Are there any other grounds ? Had the importer a right to dispose of them to any body else, *after importation* ? It is said, that *La Guayra* was an open port, and that they might have gone there for public sale : Most undoubtedly in point of fact they did not.—If *La Guayra* was ever so completely open, so that an ordinary neutral ship going there, might, without restraint, dispose of her cargo ; yet this vessel could not have done so ; she must have reported at the custom-house, to entitle the goods to be admitted, duty free ; and, the having reported duty free, the *Spaniard* was at liberty to claim them under the contract : and, if that claim was made, what right had any person to withhold possession ? By demanding to be admitted free of duties, the claimant would have acknowledged them to be contract goods, and the *Spaniard* would have had a right to the delivery, before the delivery of the tobacco. It is not unimportant that the goods were not to be purchased, by a previous delivery of tobacco, in exchange ; but they were to be deposited *first*, as the purchase of the tobacco *afterwards* to be delivered. It is in vain to say, that on their arrival at *La Guayra*, the parties might have waved their privilege, and put themselves upon the footing of general traders ; because the contract between *Robinson* and *Sontag* binds them not to waive that privilege, if the *Spanish* government was willing to adhere to its engagement. It was only on  
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the unjust refusal of the *Spanish* government, to execute the contract, that the ship is then to be considered as a general trader, and to take the chance of the market. Under these circumstances, I am strongly disposed to hold, that this cargo was going in time of war to the port of a belligerent, there to become the property of the belligerent, immediately on arrival, and that the legal consequence of condemnation would on that ground alone attach upon it.

Letter from  
Robinson to  
Young, Oct. 14,  
1801.

But there is a second question—Whether such a contract does not fix on *Robinson* the character of a *Spanish* merchant, and by conferring that character on him, confer it also on those who adopted the contract under him. What is the effect of the contract? It is to give a privileged monopoly of the tobacco trade of those settlements for three years; and that privilege guarded by other privileges of a high nature. These goods were to be imported, and other goods exported duty free. They were to be sold to the *Spanish* government, and for the use of the *Spanish* settlement. This gives at least the full benefit of the *Spanish* character. It may possibly go farther; since there is no reason to suppose, that a *Spanish* merchant, merely as a subject of *Spain*, would have been admitted to such privileges, in the ordinary course of his private trade. Can such a communication of peculiar indulgence, which elevates Mr. *Robinson* above the private *Spanish* merchant, be considered then as less than a communication to these individuals of the entire benefit of a *Spanish* character, as far as this transaction is concerned? In such a state, what is there wanting, to constitute the absolute *Spanish* character?—Nothing, but actual bodily domicil. The parties can hardly be said even to want

want *that*, because they have a stationed resident agent in the *Spanish* settlement, for the very purpose of conducting this permanent commercial undertaking. It is not, indeed, held in general cases, that a neutral merchant, trading in the ordinary manner, to the country of a belligerent, does contract the character of a person, domiciled there, by the mere residence of a stationed agent; because in general cases, the effect of such a residence is counteracted by the nature of the trade, and the neutral character of the merchant himself. But it may be very different, where the principal is *not trading* on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There the nature of his trade does not protect him. On the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it. This circumstance operates, if I may so express it, in such a case to fill up the totality of all that is required to constitute a *Spanish* character. This is the state in which Mr. *Robinson* would have stood under the contract.

Then how does it affect Mr. *Sontag*, who is engaged in carrying it into execution? The legal consequence will be, to clothe him who accepts the contract, with the same character, so far as this transaction extends. It is by nothing peculiar in his own character, that Mr. *Robinson* would be liable to be considered, as a *Spanish* merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and accept those benefits, they take their share also in the legal effects. They accepted his privileges: They adopted his resident agent: It would be monstrous to say, that

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that the effect of the original contract is, to give the *Spanish* character to the contracting person, but that *he* may dole it out to an hundred other persons, who, in their respective portions, are to have the entire benefit, but are not to be liable to the effect, of any such imputations. The consequence would be, that such a contract would be protected, in the only mode, in which it could be carried into effect ; for a contract of such extent must be distributed ; and if every subordinate person is protected, then here is a contract, which concludes the original undertaker of the whole, but in no degree affects one of those persons, who carry that whole into execution.

On these grounds, I am of opinion, that these goods are liable to be considered as the property of the *Spanish* government ; and farther, that these parties are liable to be considered as persons clothed in this transaction, with the character of *Spanish* merchants.

Cargo condemned.

In this case the freight was refused, and the claim for the private adventure of Capt. *Radeloff*, mate and *supercargo*, was rejected, on the ground of the prevarication of the evidence.

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THE RENDSBORG, NYBERG Master.  
And other ships.

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**T**HIS was a case respecting the cargoes of several vessels, (a) taken on a voyage from *Batavia* to *Copenhagen*, and claimed for the house of Mr. *De Coninck* and Co. of *Copenhagen*. On the first hearing, an order was made for farther proof, as to the property, and also as to the nature of the contracts, under which the goods appeared to have been purchased of the *Dutch East India Company*, by Mr. *De Coninck's* agent at *Amsterdam*.

Colonial trade.  
—Contract with a privileged company of the enemy, under the avowed motive of securing the produce of the colony from the enemy,—how far legal, &c. condemnation.

The judgment of the Court on this important case, goes so fully into the discussion of the several topics, on which the case was argued, that it is rendered unnecessary to prefix a statement of the argument in this report.

JUDGMENT.

Sir *W. Scott*.—The present question arises on several cargoes coming from the *Dutch* settlement of *Batavia*, and claimed for the house of *De Coninck* and Co. of *Copenhagen*. The property is of such value, as to create peculiar alarm. I have not been insensible to the anxiety of the parties, who have been long

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(a) The *Rendsborg* was detained at *Saint Helena*, July 1798. The ship, in this case, claimed for *Duntzfeldt* and Co. of *Copenhagen*, but suggested, by circumstances disclosed in the evidence, to have actually belonged to Messrs. *Fairly* and Co. *British* merchants at *Calcutta*, was condemned in the Court of Admiralty June 26, 1799.—Affirmed Lords, March 12, 1803.

looking

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looking for a decision : They, I trust, will not be insensible to the cautious deliberation, which is required in disposing of great interests. It may be the abstract duty of persons in a judicial situation, to look only to the merits of the question ; but the magnitude of the interests involved may in some cases be a very essential ingredient in the question itself, and is, in all, a powerful call upon the painful attention of him, who has to decide upon it.

Into the ordinary state of the trade, at the settlement of *Batavia*, which has been occasionally disputed in this Court, I have made particular enquiries ; and I have satisfied myself, by resort to what I consider as means of authentic information. In the accounts given in books, it is represented, " that *Europeans* are not usually admitted as merchants, except *Spaniards*, who have certain commodities to barter, and have obtained particular privileges." With respect to other nations, Abbé *Raynal*, on whose account, not confirmed by other testimony, I should not perhaps venture absolutely to rely, says, " that *English* vessels are seen there more frequently, than those of other countries ; they touch there in their voyage from *Europe* to *China*, under the pretence of obtaining water, but the trade carried on by them is a secret and clandestine trade." These accounts, confirmed from other quarters, satisfy me, that the trade of that settlement is permitted to foreign nations, with a very limited indulgence indeed.

The peculiar trade is carried on by a company, resembling in name, title, and authority our *East India* Company, but bearing a much larger proportion to the wealth and power of its parent state ; it is carried

ried on by fleets of twenty-eight or thirty ships, annually sent out with *European* goods, a part of which ships only return to *Europe* with the products of the *East*. The Company entirely retain to themselves the monopoly of certain goods, denominated fine goods, particularly those which are called spices; as to them, I have met with no account, either printed or otherwise, in which spices are not represented as objects of the Company's monopoly.

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It has appeared in other cases, as it does in these, that during the war, foreign ships have been admitted to import and export. Since the instructions of *January* 1798, (supposing that those instructions apply to settlements in the *East Indies*), there is no right to question such a trade, if the vessels are going to the ports of their own country: And if this were a simple case of that nature, there would be no great difficulty in disposing of it, by the same rule on which other ships so engaged have been restored, with their cargoes, appearing to be *bonâ fide* neutral property. But this case comes under a different aspect. It is not the case of an individual merchant, nor of a company, going to trade on the general permission, in an ordinary character, or on a common footing. It is a trade, carried on to an enormous extent, invested with particular privileges, secured by peculiar contracts, and transferred from the public Company, to which it exclusively belonged, to these individuals, upon an express acknowledgment, understood, and acted upon, on both sides, that it was so transferred, in order to relieve the goods, which were confined there by the pressure of war, and could not be delivered

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vered by any other practicable mode. The question is, Whether a commerce formed with such views, and so conducted, can be entitled to a neutral character? I will take it, that there is no difficulty upon the particular facts of the adventure, and that there is no objection to the sufficiency of the proofs of property. Taking the goods to be the property of *De Coninck*, is the commerce neutral? It is a possible thing that the commerce may not be neutral, although the property is; and if that is the case, the mere neutral ownership will not be a sufficient title to restitution.

It appears that the ancient authority of the Directors of the *East India* Company had been superseded, and the affairs of the Company transferred, with correspondent powers, to what is called a Committee, between whom and Mr. *De Coninck* there have been three contracts: The first, 24th *February* 1797—the second, 5th *July* 1797—and the third, 28th *June* 1798. It will be proper for me to consider these contracts; first, in their inducements and motives, secondly, in their substance, and thirdly, in the mode of carrying them into execution.

The motives are expressed in the preamble, and are detailed in these words: “The Committee, impressed with the great difficulty, *if not utter impossibility, under the present posture of affairs*, to convey hither from *Batavia* the valuable produce of *India*, have made it a subject of the most serious consideration, to find out such means as might tend to save, at least as far as possible, the cost of the said commodities; to attain to this end, they have at last resolved, *under the present pressure of*  
“ *necessity,*

“ *necessity*, to listen to various proposals, relative to  
 “ the sale of such commodities. That these sales  
 “ might be effected in the best possible manner, they  
 “ have thought fit to authorize the commissioners of  
 “ the first part to sell, &c.” In consequence of the  
 difficulties of their situation, it is, that the Company  
 listen to the proposals made by Mr. *De Coninck*, and  
 sell to him a very large quantity of the most valuable  
 commodities.—On these motives, it is to be observed,  
 that nothing could be clearer than the inducements of  
 the seller; and also, that *nothing could be made more clear*  
 to the apprehension of the purchaser. In some cases,  
 the neutral contractors may say, “ We are not bound  
 “ to look minutely into the reasons of the seller. The  
 “ *Dutch* have opened their trade; we may conjecture,  
 “ perhaps, that they have done this on account of  
 “ the distresses and difficulties of the war; but we do  
 “ not *know* it. There may be other causes,—a more  
 “ liberal commercial policy may have been adopted;  
 “ we are not bound to look inquisitorially into the  
 “ motives, whatever they may be.” The neutral  
 purchaser cannot in this instance resort to such pleas,  
 because the very preamble of the contract states the  
 motives, and declares that it is owing to the pressure  
 of the war, and to no other cause. It has been argued,  
 that the motive does not concern the buyers. “ That  
 the motive of the sellers is nothing to the buyers,”  
 is laid down as a position true in the most unlimited  
 extent. I think that is advanced a little too largely;  
 because if the motive is disclosed, it is possible that  
 the duties of neutrality may, on the disclosure of such  
 a motive, create some new obligations on the neutral  
 purchaser, arising from his relation to the other belli-  
 gerent;

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gerent; *the grand fundamental duty of neutrality being, that he is not to relieve one belligerent from the infliction of his adversaries' force, knowing the situation of affairs, upon which the interposition of his act would have such a consequence.* Neutrals may not be bound to enquire very accurately; but if it is clearly declared, either by the fact itself, or *a fortiori*, by express acknowledgments, they are bound to take notice of it, and regulate their conduct accordingly. If one belligerent is in a state of distress, created by the superiority of his enemy, and on that account gives invitations to neutrals, for other pretended reasons, it is not necessary for me to say, how far the neutral is bound to scrutinize the truth of those reasons, and to decline, in all cases, a beneficial invitation upon his own private surmises. But if a belligerent come, and say, "I am in the utmost distress; my enemy is all-powerful; without your assistance, I am a lost man;" in such a case, it is an invitation, which he is manifestly not at liberty to accept. He cannot afford such assistance, without being guilty of a direct interposition in the war. Nor does it affect the justice of the case at all, that such assistance is not given gratuitously: Though done *lucranda causa*, it is not less an unlawful interposition. A man does not send contraband, out of pure love of the enemy, but with a view of obtaining advantage to himself, from the relief of the enemy's distress. If it is a sound principle of the law of nations, that *you are not to relieve the distresses of one belligerent, to the prejudice of another*; any advantage that you may derive from such an act, will not make it lawful. The adversary has a full right to destroy his commerce.—By his own confession,

confession, the adversary is effecting this; he has the power, as well as the right, and *you are not*, from a prospect of advantage to yourself, or from any other motive, to step in, on every cry out for help, and rescue him from the gripe of his adversary.

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Another argument urged, is, "That Mr. *De Coninck* knew nothing of *this*, that the preamble was merely thrown in to justify the Committee to the original Company, and that it is so described, in a letter from the agent of Mr. *De Coninck*, in which he says,—From the novelty of the engagement, they have been induced to enter their reasons in the preamble. As the motive is a matter perfectly indifferent to you, we have suffered them to insert for their vindication whatever they may think proper." According to this representation, the distress of the Company had never been in the contemplation of *De Coninck*; the mention of it was merely thrown in by others, when all was settled and arranged, and had never before presented itself to his view. In answer to this, it might be sufficient to observe, that Mr. *De Coninck* does not execute the contract, till after this declaration; and that the execution of the contract is to be taken as the real commencement of the business; all before was negotiation, unfinished negotiation; there were no preceding articles to bind him; so that at any rate *he begins* the business, knowing its real foundation. But, further, it is to be recollected, that some letters of Mr. *De Coninck* have been brought in, which were written to Mr. *Voute*, his agent, at *Amsterdam*, disclosing the commencement and progress of these negotiations. From them, it is perfectly clear, that Mr. *De Coninck* knew extremely well, not only the

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the distress, to which the commerce of *Holland* was reduced by the maritime superiority of the enemy, but also that the pressure inflicted on that commerce, was the actual motive, which induced the *Batavian* Committee to enter into this contract.

(a) Letter to  
Voute, at Am-  
sterdam, 16th  
Aug. 1796.

The letters of Mr. *De Coninck* (a), contain the following passages: "We write to you concerning  
"the immense accumulation of merchandizes, which,  
"owing to the present war, so fatal to your *East India*  
"Company, we incline to think, must at this time  
"be at *Batavia*, for want of the means to bring them  
"to *Europe*. We propose to treat with them for the

(b) Letter to  
same, 3d Sept.  
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"sale thereof." "(b) We are the more disposed  
"to think that they will be so inclined to sell, as  
"that trade is, as it were, entirely ruined for *Holland*,  
"at this present time, by the almost insuperable  
"obstacles thrown in its way, and which we think  
"more likely to increase than diminish." In a

(c) Letter, 15th  
Oct. 1796.

subsequent letter (c), adverting to two other plans, one of neutralization, which Mr. *De Coninck* disapproves as dishonourable—the other, of getting the produce by means of private trade, which he declares to be inadequate to the occasion, and exposed to insurmountable obstacles.—Censuring both these plans, as offered by projectors, to enrich themselves at the expence of the Company, Mr. *De Coninck* writes: "It is very plain, therefore, that your  
"Company will be induced to abandon that plan,  
"and try to find out other means of securing to  
"themselves, if not the goods in specie stored up at  
"*Batavia*, at least the value of them, and by means  
"of real sales effected in *Europe*." "(d) The deplora-  
"ble situation of your *East India* Company, and the  
"impossibility

(d) 5th Nov.  
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" impossibility they are under of bringing, themselves,  
 " to *Europe*, the immense produce accumulating  
 " yearly at *Batavia*, and which will be finally spoilt  
 " and corrupted, ought, with many other considera-  
 " tions, to induce the Committee to enter into our  
 " views, and prompt them to agree to a real and ef-  
 " fective sale. In case of a continuance of the war,  
 " what course must the Committee take? If they  
 " persist in not selling the goods accumulating yearly  
 " at *Batavia*, the longer they put off the sale, the  
 " longer they postpone the opportunity of procuring  
 " the money they stand in need of. *If there were*  
 " *the least appearance of peace taking place, it would*  
 " *neither suit us to make the intended purchase, nor the*  
 " *Company to agree to it.*" To the same effect, are  
 the letters of Messrs. *Voute*, the intermediate agents at  
*Amsterdam*. " After a conference of nearly four  
 " hours, we have so far carried our point as to pre-  
 " vail on them to admit the foundations and the prin-  
 " ciples of your letter; they have in consequence  
 " agreed to treat with you concerning the sale of a  
 " quantity of merchandize deliverable at *Batavia*; on  
 " condition however, that the quantity may not be  
 " of *small extent*, but on the contrary, of a sufficient  
 " consequence to justify the transaction, and the *Com-*  
 " *pany's deviating from their usual mode*: by which  
 " means they may have the prospect of procuring by  
 " such a sale a pretty considerable sum of money, of  
 " which they stand in need." These are strong and  
 remarkable passages,—What is their real meaning?  
 Is not the meaning this: " I prove to you, that you  
 " cannot extricate yourselves by the modes usually  
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"resorted to, private trading will not do, neutralizing will not do : There is no help for you, but "in my project ; you are fallen men, if you do not "close with it." Can there be a more direct offer to aid an enemy, founded upon the very ground of his distress? Can this be considered any otherwise than as an act of relieving a belligerent—and, from a knowledge of his situation? Is it not even to run before any invitation from the distressed belligerent, and to press upon him, beforehand, the means of safety and deliverance? Is it not to say, You, the belligerent, are imprisoned ; we have the only key by which you can be enabled to escape.—Give us a good bargain, and, by our aid, you shall laugh at your baffled adversary. Looking at the admitted foundation of these contracts, I should contradict every idea of neutral duties, which either legal education or reflection, has conveyed into my understanding, if I could hold them to be consistent with those duties. It is impossible not to say, that such contracts are radically and fundamentally vicious, in their original purpose and intention.

Then let us look to their substance. Their substance is to sell in *Europe*, these goods imprisoned at *Batavia*. The first contract was to the amount of ten millions of florins, enlarged afterwards to fifteen, and finally to nineteen millions of florins : The first requiring 10,000 tons of shipping, or about twenty ships, as they compute in their letters to their agents : The second half as much more, and the third, something less, requiring in the whole, about 19,000 tons of shipping, or about thirty-eight ships : The  
articles

articles were to consist of all the products, even the most valuable *peculia* of the Company—spices, which are held by the most jealous monopoly, and were never, from all the information I am able to collect, permitted to be sold to foreign *European* traders. It has been argued, that in this particular cargo of the *Rendsborg*, there was but a small quantity of spices. It was merely accidental that there was not more in this ship, owing to an existing deficiency in the stores of that nature at *Batavia*, as the contract includes a very considerable quantity indeed.

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It is no express term of the contract, that the goods should be brought to *Europe*; but it is pretty clear, that the *Dutch* Company engaged upon that understanding. Mr. *De Coninck*'s letters impress upon them the absolute impossibility of bringing this produce, themselves, to *Europe*. The prices offered, are calculated upon the basis of the *European* value of the goods. It is besides a remarkable fact, that the *Dutch East India* Company insert in the contract some commodities not named by the purchaser, because, say they, "they are generally current, and will sell well in *our* markets," that is, in the *Dutch* markets; so that the investments are made not only with a view to the *European* markets generally, but to the *Dutch* markets themselves specially.

The first observation that occurs, on the substance of these contracts, is the magnitude of the speculation. It has been argued, that the magnitude is of no consequence: It has been asked, where will you assign limits? It may be difficult to lay down the precise bounds, where ordinary commerce ends, and extraordinary speculation begins. It is all relative.—But it may not be difficult to judge of a particular trans-

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action, whether it is an adventure in the ordinary proportions of even a large and extended commerce; or whether it is not so gigantic, and so much exceeding all credible bounds of trade, as to shew, that it has an unnatural origin—arising out of something more than commercial relations, out of existing political situations and views, and framed with an attention to political consequences. Suppose, for instance, that a merchant should, at the beginning of a war, contract with a Belligerent for the whole produce of a colony during the war; *That* must, I think, be held to be an illegal contract, because done evidently with the intention and consequence of placing that part of the Belligerent's dominions, as to its productions, out of the reach of war, and in a state of perfect security, in fraud of the rights of the other Belligerents. If this could be allowed, the contract might be extended still farther to the whole commerce of the enemy. Such a contract never could be held legal, although, at the same time, it might be difficult to assign a reason, why in peace this should not be legal, if it were possible. The illegality, in fact, arises from its being a contract in contemplation of war, and which never could have existed at all, but as an insurance from the pressures of the war, and with a view to evade the rights that arise out of war, and in fraud of the Belligerent—to which consequences the Neutral could not be blind. As to the effect of such a contract, it would make no great difference, whether it was indefinitely framed, so as in terms to include *the whole* commerce, or whether it specified particular large quantities, which might still be so large as to compose nearly the average amount of that branch of the enemy's trade. In proportion as the contract approached to this extent, it would approach

proach towards illegality ; It would acquire a political character ; The neutral contractor would no longer be the private merchant of his own country, trading in common with others, but he would be the great public and political agent of the Belligerent, in such a transaction, acting for his relief under the pressure of his enemy.

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In the present case, the whole estimate amounts towards two millions sterling, or about 1,700,000*l*. How much that is short of the whole produce of the settlement, during the time which the contracts take up, is more than I am able to determine : Indeed it is not easy to say, how long the contracts might be supposed to continue, because they seem to grow out of each other, with great facility, and in pretty rapid succession. Mr. *De Coninck* engages with *Duntzfeld* and Co. for a large quantity of shipping, from an apprehension that it might be wanting, and then this contract for a greater quantity of shipping, is made a reason for an application to the Company to enlarge the contract with them for more produce. An agent is then sent to *India*, to engage more shipping ; and again, after that contract is effected, another application is made, for a still farther enlargement of the contract with the *East India* Company. I see no reason why it might not have received still farther extension, or why the same inducements continuing, of the necessity on one side, and the extraordinary profit on the other, these engagements might not have been renewed, and continued to the end of the war ; since Mr. *De Coninck* himself says, “ that the occasion for this traffic was more likely to increase than diminish.” Without possessing means of ascertaining the amount of the annual importation of the  
Company,



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Company, I see, that the number of ships yearly sent from *Europe*, is stated, at about 28 or 30 ships, of which a smaller number returns. Mr. *De Coninck's* first contract was for twenty ships, and afterwards for ten ships more, in the very same year, all of which were intended to return ; if so, the importations into *Europe* would not, I presume, fall very short of the usual importation of the Company. In the degree, in which it approached towards it, it would approach towards a total devolution and transfer of the Company's trade to the *European* market.—So much as to *quantity*.

Is it not also a transfer of the enemy's *European* traffic, with respect to the *quality* of its objects? I take it to be certain, that spices and other fine articles are secured to the Company by its monopoly. It is possible, that in some few instances, articles of this sort may have appeared in other instances, and may have been restored, as the case of the *West Capell* cited in the argument. Such cases may have passed, before the nature of the trade was well understood ; but a case of this kind, in no degree answers the description of the present case. Here is an adventure, in which the Company surrenders its privileged trade, to an immense extent : It makes *De Coninck* the *Dutch East India Company*, *pro hac vice* ; he is the privileged representative of the Company, bringing home their spices, *non sua poma*, not in his proper character of a neutral merchant, but as the entire substitute of the *Dutch East India Company*.—I observe in the books, that may be consulted on this subject, that the *Dutch Company* pay no duties of exportation at *Batavia*, because, it is said, “ that would be the Company's paying to themselves.” How stand Mr. *De Coninck's* goods under the  
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the agreement? It is expressly stipulated in one article, "that his goods should pay no duties." It is argued "that this was done to preserve simplicity in the accounts, and that it comes to the same thing, as the duties were calculated in the price." Is this proved by the ratio of prices? On the contrary, the letters expressly state, "the prices to be lowly calculated, on the basis of a peace price, because it was possible that a peace might intervene." It can hardly be, then, that the export duties should have been charged in the price, because the Company's goods which came to *Europe*, paid no duties of exportation. Again, it is described in the correspondence, to have been the object, to *save the cost*, that is, the *prime cost*, as I construe it—the expence of raising or purchasing the commodities; not a word is said of *duties*, which would naturally have formed an addition to the cost, if intended to be included. I am of opinion therefore, that in this respect also, in the nature as well as in the extent of the contract, the peculiar rights of the Company were transferred to Mr. *De Coninck*, and that he is to be considered, in this transaction, not in the character of a *Danish* merchant, but here again as the agent and representative of the *Dutch East India Company*.

There is another circumstance, which is not unworthy of notice, as illustrative of the nature of this undertaking. In the contract with the different ships, which are to be employed in this service, Mr. *De Coninck* stipulates, "that they shall not be subjected to greater expences, than the ships of the *Dutch East India Company* are accustomed to pay." It is clear from this article, that these ships were expected to enjoy at *Batavia*, all the exemptions of the Company's ships. The charges of the cargo are to be borne by  
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the freighters, and those of the ship by the owners, but with a provision, that, "if greater disbursements are demanded for the ship, than are usually paid by the *Dutch East India Company's* own ships, such disbursements shall be for the account of the freighter, but without deducting from the freight." I cannot but infer from this expression, that Mr. *De Coninck* did expect, by virtue of his agreement, that more *would not be* demanded; and that if any such demand was made, it would be only by the mistake or perverseness of the Company's servants in *Batavia*, which might easily be rectified in *Europe*; for it is not to be conceived, that he would engage to pay the same freight at all adventures, whether he was loaded with foreign duties or not. All this looks like a handing over to Mr. *De Coninck*, *pro hac vice*, of the peculiar rights and privileges of the *Dutch East India Company*—an appointment and surrogation of him, under circumstances of dire necessity, as a substitute and representative of that body.

It is argued, that "Mr. *De Coninck* had no monopoly," because other ships have appeared to have been trading there, on the account of private merchants." But it is to be remembered, that Mr. *De Coninck* in his letter represents this trading of private unauthorized merchants as practicable only in a very precarious and limited degree—not much beyond what may be supposed to have existed before, in the shape of private and irregular commerce. So that *the Company's trade*, may be conveyed very consistently with this exception to Mr. *De Coninck*; for no monopoly, so understood as to exclude *all* trade, ever existed in practice, on the part of the Company itself. There is besides a circumstance too significant to

to be overlooked in a letter, of his agents (a) in *India*, directed to Mr. *De Coninck* in *Europe*, and dated 29 Aug. 1798. They complain of the private trade carrying on at *Batavia*, and the interposition of straggling adventures, which come, and run off with the profit, which ought to belong to them;” and then observe “ we think it might be prevented, by the prohibition mentioned in our Principal’s letter of the 5th of *March*, respecting the exportation of *Batavia* produce with no other ships than those of our Principal; and then these *Bengal* speculators would be obliged to come to us for freight; we have not yet seen, or heard, of such a prohibition taking place.” From this passage it appears, that Mr. *De Coninck* had meditated, if not applied for, an actual monopoly; whether the application was actually made, or with what success, does not appear, for none of Mr. *De Coninck*’s letters to his agents or supercargoes in *India* are produced. It is not to be inferred, that he did not apply, or that it was not granted, merely because the agents in *India* had not yet heard of it. They repeatedly inculcate the necessity of it: They talk of a resolution of the Government in their favour, which they hope will produce great effect on foreign ships.

Upon this view of all these circumstances relating to the contract, it is difficult not to say, that it was, in effect, a handing over of the peculiar privileged commerce of the *Dutch East India Company* to this House, with the difference only of the goods being to be carried to *Copenhagen*. Can it be said, that Mr. *De Coninck* is in such a transaction carrying on the trade in the mere ordinary character of a *Danish* merchant? Is he not exercising the peculiar and appropriate

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propriate privileges of the *Dutch East India Company*? These privileges are thrown into his lap for a valuable consideration indeed, but still it is the privileged trade of the *Dutch East India Company*, carried on upon such a footing, as was allowed to no other man, or body of men, but that Company.

It is no matter of surprise, that the Committee felt the necessity of apologising in the preamble, for such a total transfer of their rights to a foreign merchant. I observe, that the servants of the Company in *India* seem to have viewed the undertaking with great jealousy, as a strange mode of doing the business, *not of Mr. De Coninck*, but of the Company itself. "We" could not have expected, say his agents in *Batavia*, "in a letter of 4th April 1798, to have met with so" many unpleasant circumstances; in every way we are "unable to come to a good understanding with the" Company's servants, from the highest to the lowest, "for they get nothing by us, but are deprived both of" their privileges and fees. *The expedition is suspected*, "and we are looked upon, rather as spies of the Committee, than as supercargoes to our Principal."

(a) Letter 30th  
Sept. 1798.

In the next place, the mode, in which this contract is to be carried into execution, is by sending agents to reside in *Batavia*, as long as the contract might render their presence necessary; and these agents seem to look with satisfaction to a protracted stay; for they write (a), "It gives us satisfaction to hear you have increased your contract, we hope we shall enjoy this benefit, whilst the Government continues to deliver produce, and we have ships for it." The Governor and servants must have received their instructions, to attend to the requisitions of these agents,

so constituted the agents of this great house of trade, at *Batavia*.—Part only of the correspondence from these agents is exhibited ; it is clear that a letter written by them on their first arrival, perhaps the most material, is not produced. The first that is produced, of the 25th *Feb.* 1798, is manifestly written after some residence in that place. No part whatever of Mr. *De Coninck's* correspondence with them is exhibited, though, as I have mentioned, an important paper in one of them, relative to the absolute monopoly, is adverted to, in one of the letters from the agents in *India*. These agents are addressed to Messrs. *Nun* and *Specht* of *Batavia*, who have authority, in case of death, to nominate other agents, on behalf of the principals, yet no correspondence with these gentlemen is produced. These agents are sent to reside in the country, during the fulfilment of this gigantic contract, to carry on a regular business of export, on the part of Mr. *De Coninck*—rivalling that, which the *Dutch East India* Company could have carried on by its *Indian* servants. Is this house of trade, so settled in *Batavia*, and with such appearance of permanency, a circumstance totally insignificant, in fixing a *Dutch* character of domicil on this transaction ? I know, that a residence of agents in the enemy's country, has not been held generally to impress the character of that country, upon the transactions of principals resident in a neutral country, where the transaction itself has been in other respects perfectly neutral. The neutrality of the trade shall prevail against the effect of that circumstance. But where the trade itself cannot claim to be so considered, and is carried on from the enemy's country, by agents representing the principals therein,

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it should seem, that the mere personal residence of the principals elsewhere, would hardly protect such a trade, so conducted, from being considered as the trade of an enemy.

This is the view which I am inclined to take of this contract, with respect to the motives which gave it birth, with respect to its substance, and the mode in which it is carried into execution ; and I collect the particulars which compose this general view, from the evidence, without calling in question the truth of any part of it as represented by the claimant. To a severe judgment, some observations might naturally occur on the evidence itself. No man can say, that the unnatural size and magnitude of the undertaking, does not throw something of a strong improbability upon it, as the undertaking of one single mercantile house, whatever its opulence may be ; and if other individuals are supposed to share in it, the national character of those individuals might be an object of just curiosity. There is a great mass of correspondence produced, but the correspondence of Mr. *De Coninck* with his agents in *India* is wanting. The correspondence with Messrs. *Neun* and *Specht*, two *Dutch* persons of importance in the colony, is also not produced. It has been said, the letter of introduction was enough ; scarcely so, I think, considering the large part, which these gentlemen were to take, in superintending, advising, controuling, and nominating, in case of vacancy, the agents of Mr. *De Coninck*, that were to be stationed in *Batavia*. It is scarcely possible that such functions should have been delegated on the one side, or accepted on the other, in so very simple and summary a manner, respecting a  
transaction

transaction of such enormous bulk and responsibility as this is. Another circumstance not entirely unworthy of observation, is, that the demand of payment is not made on the part of the *East-India* Company for these cargoes, though distressed for funds, till long, not only after the seizure, but after the term, apparently prescribed by the contract (a). These are circumstances, of which an adverse use might be made, by a judgment disposed to give unfavourable interpretations. But looking at the full attestation, which Mr. *De Coninck* has made, and to the explanations given by his counsel, I am not disposed to dwell on such points with particular jealousy. I take Mr. *De Coninck's* facts upon his own representation, according to my understanding of the evidence; I apply to those facts, what I conceive to be the law. The representation of fact is, that this is the execution of a contract between the belligerent and a neutral merchant, framed under an admitted and avowed knowledge of the distress of that belligerent, occasioned by the superiority of his adversary's arms—that it is a transaction founded on that distress, as the sole ground, on which the contract is professed to be entered into, on the part of the enemy, and on which he is invited and urged to it by the neutral—that it is entered into, with a declared intention, on the part of the belligerent, to relieve himself from that distress, and with a perfect knowledge of that declaration, on the part of the neutral merchant, who not only acts upon that declaration, but himself urges

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(a) In the first contract the payment was to be made, one moiety at three months,—the other moiety at six months, after intelligence received of the goods being delivered at *Batavia*.

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the necessity, and represents this contract, as the only mode which can afford any prospect of relief—That a contract framed upon this basis, is, in substance, a substitution of Mr. *De Coninck* in the place of the belligerent, with all the rights and privileges of a peculiarly favoured corporation, belonging to the belligerent country—and lastly, that the mode of its execution, is to be conducted by agents, stationed in the enemy's foreign settlements, where foreign merchants are not ordinarily permitted to reside, there to act as merchants, in the continued exportation of cargoes of immense value.

These are the facts of the case—It will belong I presume to another tribunal to decide finally upon them; but it devolves upon me, to exercise my judgment upon them in the first instance. I should be unworthy of the trust reposed in me, if I did not feel the painful caution, which the magnitude of the interests concerned ought to inspire. But if I judge rightly, it is rather the magnitude of those interests, than the difficulty of the question, which produces that effect. However, meeting the exigencies of my duty, with the firmness it becomes me to collect, and under the support I derive from the knowledge, that any errors of mine will be rectified elsewhere, I must declare my conscientious judgment to be, that these contracts, so framed, and upon such views, are unlawful contracts, and that the property engaged in the performance of them, is subject to condemnation.

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(Instance Court.)

**T**HIS was a case on a demand for wages, on the part of a mariner who had sailed in the ship from *Newcastle*, and had been captured and taken out, and sent to *France*; the ship being afterwards re-taken, and carried on to the port of destination.

Mariners' wages—demand of a mariner captured in the ship, taken out and carried to France, whilst the vessel was recaptured, and brought to the port of her destination.—Wages not due.

*Against the demand*, it was contended—That the right of the mariner, had become extinct by the capture; that the freight ultimately earned, was earned by the subsequent services of the crew, in which this man bore no share; that he had failed to perform his part of the contract, which was to return with the vessel.

*On the other side, Laurence.*—There is no doubt that this man performed all the services in his power; But the point of law is pressed against him: No determination is produced on this question, and therefore we must advert to what appears to be the equitable principle of the case. By the services which had been performed, an inchoate lien was obtained; but capture ensued: If the matter had ended here, the claim for wages could not be sustained; but *the whole* interest being recovered, all the burdens before attaching on the property revived. It is said, the man has not shared the benefit of the re-capture; so much the more unfortunate his condition. He was carried a prisoner into *France*, and has suffered imprisonment,

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ment, in consequence of his connection with this ship. On what principle of justice can this additional calamity be pressed against him, to work a total forfeiture of the right, which had accrued to him.

*Court.*—What is the exact sum that is demanded. The argument goes only to wages up to the time of capture.

[*The King's Advocate.*—The petition claims the whole.]

#### JUDGMENT.

Sir *W. Scott.*—This is a case of private hardship arising out of the events of war. The question for me to consider is, whether the law can afford the remedy which is prayed. The engagement was for the run from *Newcastle* to *London* and back. The ship sailed on the 20th of —, and was captured on the 22d of the same month, off the *Sporn Head*, by a *French* privateer, when this man and others were taken out and sent to *France*. The ship was retaken, and arrived at *London*. It is said, that this man was captured in the service of the vessel; so he was—but it was not in that capacity, nor on that account, that he was captured. He was taken as a *British* subject, liable, with the rest of his countrymen, to the hazards and hardships of war. The owners are not indebted to him on that account. Nothing can be better settled, than that the act of capture defeats all rights and interests; but it is contended, that the former interest revives upon the recapture. Unfortunately, there is a circumstance in this case, which makes a material distinction, viz. that the claimant was not on board  
at

at the recapture, but had been sent a prisoner to *France*, whilst the owner was obliged to hire another person in his place, to work the vessel on the returned voyage. Under these circumstances, the utmost that could be demanded, with any shew of reason, would be the small portion earned prior to the capture, two days' service, and that subject to salvage. Beyond this it is impossible to advance a pretension; for what right can a person in captivity have, to demand the benefit of the labour of those, who carried the ship on to *London*? or, still more, of those who were hired in his place for the returned voyage. The utmost that could be demanded would be but the pittance of two days' service, and that subject to a salvage, supposing that portion of interest to be revived by the recapture. But I am of opinion, that this interest, too small perhaps to be the proper object of a litigation, is not legally revived in favour of this individual, by a recapture, which in no degree restored him to his connection with the vessel; although the misfortune of his captivity may well entitle him to the kind consideration of his owner.

The  
FRIENDS.

Dec. 11th,  
1801.

THE HOOP, MORREL Master.

Dec. 17th,  
1801.

**T**HIS was a case, on a demand made against the Marshal, to recover the value of a long boat, and best bower cable, lost whilst the ship was under his custody.

*Swabey stated*—That the affidavit of loss had been communicated, and prayed, that the Court would decree the Marshal to account for the articles which were missing.

Demand against the Marshal, for reparation of a loss sustained by pillage, whilst the property was under his custody.—  
Granted.

The  
Hoop.

Dec. 17th,  
1801.

For the Marshal no appearance was given, but the Deputy Marshal said, that though not particularly instructed in this case, he could say generally, that it was not in the power of the Marshal entirely to prevent depredations that might be made, whilst the property was in his custody ; that his fees were too small to enable him to provide means of absolute security.

*Court.*—It is not proper, that such a complaint should be left, without an answer being returned to it on the part of the Marshal. The credit of the Court is concerned in the safe keeping of the property under its protection. If any such property is lost, it is at least the duty of the Marshal to be prepared to shew that it was not lost by any default of his. If the fees of the Marshal's office are not sufficient to enable him to provide means of security, it should be represented to those who have authority to increase them ; but it is not a time to rely upon such a plea, when property under his keeping is alleged to have been already lost. As the statements of these affidavits are not contradicted, I shall decree as prayed.

*Swabey.*—As no answer has been given to the petition, I believe I am entitled to apply for the costs of the petition.

*Court.*—I am bound to decree that also.

## THE FRANKLIN, Goodrich Master.

Dec 18th,  
1801.

**T**HIS was a case of a *British* ship and cargo, bound ostensibly on a voyage from *Liverpool* to *Naples*, but captured much out of that course, whilst going actually into a *Spanish* port in the bay of *Biscay*. Farther proof had been directed to be made of the property, and of the destination. Proof was now brought in, consisting of the affidavits of *British* merchants, asserting the destination of their goods to *Naples*. Their letters of orders and advice being also produced, the proof was held sufficient, and the property was directed to be restored. To account for the deviation into a *Spanish* port, it was stated in an affidavit of the master, "that he had met with bad weather; and that, the ship becoming leaky, he was compelled by his crew, to make the nearest land." In opposition to this account, it was stated on the other side, "that the ship was not in a bad condition; that she was after capture brought to *Jersey* without difficulty or danger."

Salvage—military, for preventing a British cargo from going into a port of the enemy, not due.—For actual service in preserving the ship and valuable cargo from distress, &c. a reward of 500*l.* given.

*On the part of the Captors, The King's Advocate and Robinson* argued—Salvage at least is due; since the captors have evidently rescued the property from going into the hands of the enemy. If the account be true, that the destination was really *not* to *Spain*, the owners by this deviation would have sustained a

The  
FRANKLIN.

Dec. 18th,  
1801.

loss of a very valuable cargo. Whether it was owing to a fraudulent purpose of the Master, or to the asserted distress, the peril was equally great to the owners: The salvors have been the means of preventing the property from falling into the hands of the enemy, and are entitled to salvage.

*On the part of the Claimants, Arnold and Swabey* contended—The captors having persisted to proceed against this property as prize, cannot now in reason on being defeated in that demand, turn round and present themselves as benefactors to the claimants of this cargo. Much expence has been incurred by these proceedings, and the claimants have been much injured by the previous misconduct of the captors, and their obstinacy in persisting to carry the ship to *Jersey*, instead of bringing her, as was requested by the supercargo, to *Falmouth*. It was farther contended, in point of law, that the act of rescuing a ship merely by preventing her from going into the port of an enemy, was not a service for which salvage was due; and the case of the *El Navarro* (a) was relied on, in which such a demand had been rejected.

(a) *El Navarro*,  
Adm. Nov. 11th,  
1793, Lords,  
July 18th, 1795.

*In reply, the King's Advocate and Robinson.*—The complaint of the claimant depends entirely on a supposition, that there was no cause of capture, and that there was nothing to justify a seizure as prize. Having seised as prize, the captors were perfectly at liberty to return to *Jersey*, being their own port—a restriction to which cruizers were anciently enjoined in all cases to conform. It is no objection against a claim of salvage,

that seizure had first been made with other intentions. Suppose a ship under enemy's colours, and in great distress: If a cruizer goes up, and retakes, and afterwards finds *that it was a neutral vessel*, which had been captured by the enemy, (for the recapture of which no salvage is ordinarily due), would not a salvage of distress be demandable? The real benefit in the present case, is great and substantial. If it is not in strict technical consideration to be deemed a case of legal salvage, the Court will at least allow something *nomine expensarum*, for the time and labour employed in bringing this valuable property to a place of safety.

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## JUDGMENT.

Sir *W. Scott*.—The first question now before the Court is, whether the captors of this ship and cargo, can entitle themselves to be considered as salvors? On their part, two kinds of salvage are claimed: First, a military salvage, as it may be termed, in rescuing the property from the enemy; and secondly, a salvage, in preserving it from distress, and peril of the sea. The vessel had met with bad weather, and had sprung a leak, and was at the time of capture, found very near *St. Andero*, intending to go into an enemy's port, for the preservation of the lives of the crew. Whether the danger appeared so great to the privateer may be doubted, as it has turned out, that with the aid of a few more hands, they kept the ship eight days longer at sea, and at last brought her safely into a port of *Jersey*. There might therefore be a reasonable ground of enquiry, whether the distress  
alleged,



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alleged, was a *bonâ fide* distress ; and whether the ship and cargo, were not actually going as the property of *British* subjects to trade with the enemy. These appearances did, in my apprehension, afford sufficient ground of a suspicion, and entirely remove all complaint against the privateers, “ that they acted improperly in bringing her in for adjudication :” Their conduct has already been justified, by the order which has been made for farther proof.

The next question that occurs is, whether military salvage is due, as for a rescue from the enemy? I think it is not. No case has been cited, and I know of none, in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case of salvage, where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy. In such cases, the same hazard is incurred by the salvor, and the same reason exists, to hold out a stimulus to recaptors. But in this case there was no enemy to encounter. The danger to the parties was contingent only, and though probable to occur, had not actually occurred. The case which has been cited in argument, does in point of authority apply. It was the case of a *Spanish* ship coming from *New Orleans*, ignorant of hostilities, which had lately commenced, and going into the port of *Bordeaux*, where she would undoubtedly have been confiscated. A claim of salvage was set up on the part of a *British* cruizer; but the Court said, “ No—the danger was some-

something distant and eventual; you had no conflict to sustain, as well might you demand salvage for giving the first information of a war. On the same principle, a *British* man of war on the breaking out of hostilities, might seize a whole fleet going, ignorant of the war, into an enemy's port, and set up a claim of salvage against them." On the authority of that judgment, the claim of military salvage cannot be sustained.

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Then it is said, "if that will not support the claim, there is another ground—that of salvage from distress;" to which it is objected, that all plea of merit on this ground is done away, by bringing the vessel out of her course to adjudication, and by other circumstances of misconduct. As to the first part of this answer, that the seizure was made *alio intuitu*, I should not be disposed to hold that sufficient to defeat the claim. If a capture is made with an intention of prize, and the ship turns out to belong to a friend, there is no reason why the original but mistaken intention of the captor should defeat any salvage interest, that might arise from other circumstances in the case.

The next question is, whether the claim is defeated, by bringing the vessel so much out of her way. Certainly, if all the circumstances attending the original situation of this ship, were to be put out of consideration, the captors would appear highly blameable for bringing her back, instead of helping her on her voyage: But the Court cannot forget, that at the time of capture, the ship was actually going into a *Spanish* port, without any apparent excuse for so doing, and without sufficient documents of property on board.

The

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1801.**

The captors had a right to bring her in as a prize. In this point of view, the bringing into *Jersey*, the port of the privateer, and as such, the most convenient port to the captors, was not improper. If this does not defeat the right, the Court has only to consider, what is the *nature of the service* performed. It is that of sending on board a number of men, and bringing the vessel and cargo safe into port. This, it may be said, is no more than an act of humanity ; so are all services of salvage, acts of humanity ; but still they are such as the policy of the law considers as entitled to reward. It is a service of putting on board fifteen men and taking out five ; that is, in fact, of lending an additional supply of ten men, and bringing the vessel and a valuable cargo into a port of security, when both were going under a conceived necessity into a port of the enemy. It is a case of no very high merit, but I cannot say, it is a case in which *no* service has been performed. The convenience to the claimant is something diminished by bringing her to a distant port ; but, as I have said this is justified by other circumstances, I must consider it in the same light, as if the property, which is very considerable (*a*), had been brought to any other port, to which the parties would have had no reason to object. I shall direct the expences to be paid, and allow a salvage of 500*l*.

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(*a*) Appraised value, 30,000*l*.

## THE LORD MIDDLETON, MONTRIE Master.

Jan. 12th,  
1802.

**T**HIS was a case of a recapture made by the *Maria* privateer, in which a claim to a share in the salvage was advanced on the part of the King's armed cutter the *Viper*, on an averment of *being in sight*. The facts were, that the *Viper* being on a cruize, a strange vessel hove in sight; the *Viper* chased, and came up, and found it to be the privateer *Maria*, the actual re-captor; they then parted, the cutter standing to north-west; the next morning the *Lord Middleton* appeared in sight at a considerable distance; the *Viper* stood to and reconnoitered, and then stood off; the privateer came up in another quarter, and by the use of her sweeps, the weather being a perfect calm, succeeded in getting up, and took possession. It was not till some time afterwards, that a claim was set up on the part of the *Viper*. All the witnesses examined from the *Lord Middleton* agreed, that the *Viper*, or *an unknown ship* in that direction, was seen from the *Lord Middleton* at the time of capture and four hours afterwards, but standing on a contrary course.

Claim of joint capture.—  
Identity of the vessel not established, claim rejected.

*On the part of the Viper, The King's Advocate and Robinson*—The *Viper* was actually in sight, and seen by the enemy at the time of capture; this is the circumstance, which is always considered as most material to establish a case of constructive assistance; in opposition to what is alleged, "that she was standing in a contrary direction," it is to be recollected, that there

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there was an entire calm at that moment, and therefore that no elongation of the vessel's course took place, by which the prospect of assistance could have been at all diminished.

*On the other side, Laurence and Swabey.*

#### JUDGMENT.

Sir *W. Scott*.—I think the claim on the part of the *Viper*, cannot be sustained. It is hardly necessary to state, that in cases of this sort the burthen of proof lies on the party setting up the claim of joint capture. The witnesses examined in preparatory, say only, "That there was a one-masted vessel in sight, at a great distance, but that they did not know what she was." An allegation has been given in, on the part of the *Viper*, stating, that the *Viper* was on a cruize off *Belle Isle*, and on the 22d *June* came up with the *Maria*, and stood off again to the north-north-west," being, as it appears, employed in carrying dispatches to Lord *St. Vincent*. From this circumstance, a presumption arises, that she would use all the expedition possible, in pursuing her own course. The next morning, this capture was made; and the first question is, Whether the *Viper* is the vessel that was seen from the captured vessel?—whether the identity of the *Viper* is proved? If any witness had been examined from the *Viper*, under release, who saw the whole of the chase, that might have proved this part of the case; but no such witness is produced. The fact of identity is left entirely bare, and destitute of proof. The witnesses examined, from the captured ship, say, "That they saw, from on board the *Lord Middleton*,  
a vessel,

a vessel, at a great distance, but that she could hardly be seen on board the privateer. They saw a ship at a great distance, but whether it was the *Viper*, or not, they cannot say. Nothing takes place to ascertain the identity. The *Viper* does not come up, but pursues her course; and it is not till some time afterwards, that, on meeting the *Maria* again, a claim to share in this capture is asserted. The identity is left to be made out by inference, which is not the way in which so material a fact ought to be established. But if that fact *was* proved, allowing the *Viper to have been* the ship in sight,—still, when I take into consideration that she had before reconnoitred this vessel, and had actually stood off on another course; without laying down any general rule to govern *all cases* of ships steering a contrary course, I may venture to say, that to pronounce for the interest of such a claim as this, would be to carry the interests of joint capture to a greater extent, than has ever yet been done. There is no *animus capiendi* even to be presumed in this instance. It is a much stronger case against the title to share, than that of ships unconscious of the capture, which is going on, or of ships steering only by accident a contrary course.—*This* is a case of voluntary and deliberate dereliction. On both these grounds—That the identity is not proved; and secondly, That the claimant in joint capture had actually reconnoitred, and relinquished all purpose of making a capture, I am of opinion, that this claim cannot be sustained.

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# THE ELEONORA CATHARINA.

KREAGH Master.

Salvage on  
Russian pro-  
perty taken out  
of the posses-  
sion of the  
French.  
*Distinctions*  
overruled.

**T**HIS was a case of a *Russian* ship, taken on a voyage from *Archangel* to *London* by a *French* privateer, and retaken by a *British* cruizer on the 7th *December* 1800.

*On behalf of a claimant of part of the cargo, Robinson contended,—That salvage on the recapture of neutral vessels had been allowed during this war, on particular grounds only, and in deviation from the former practice. That the special reasons for this alteration, stated by the Court in the War Onskan, [2d Adm. Rep. p. 299.] were the irregular and rapacious proceedings of the French cruizers, and the French Courts of Prize; under which, it was almost morally certain, that every vessel would be condemned, without respect to the rights and privileges of a neutral character. That in this case, the same reasons did not exist; since it had appeared, that a more regular course of proceeding had been restored; and more especially, since this capture was made subsequent to the convention between France and Russia; under which it could not be supposed, but that the interests of the Russian merchant would be protected.*

*On a suggestion, That a quantity of oil had been thrown overboard, to lighten the ship in a state of distress, it was prayed, that the Court would direct an average restitution to be made pro rata of the whole property.*

JUDGMENT.

## JUDGMENT.

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Sir *W. Scott*.—It is certainly true, that the standing doctrine of the Court has been, that neutral property, taken out of the possession of the enemy, is not liable to salvage. It is the doctrine, to which the Court has invariably adhered, till it was forced out of its course, by the notorious irregularities of the *French* cruizers, and of the *French* government, which proceeded, without any pretence of sanction from the law of nations, to condemn neutral property. On these grounds, it was deemed not unreasonable, by neutrals themselves, that salvage should be paid, for a deliverance from *French* capture. The rule obtained early in the war, and has continued to the present time. It is said, that a great alteration has taken place in the *French* proceedings; and that we are now to acknowledge a sort of return of "*Saturnia Regna*." This Court is not informed, in a satisfactory manner, that any such beneficial change has taken place in the administration of Prize Law in the tribunals of *France*; and therefore it will continue to make the same decree, till the instructions of the Superior Court shall establish a different rule. As little can the Court attend to the capricious and fleeting politics of *Russia*, at that period, under which, it is said, this property would have been protected. They were, probably, unknown at the time; or, if known, it is not very likely that they would have availed the claimants, who were bringing a cargo of oil, tallow, and hemp to this Country, which was then to be taken, under such a situation of affairs, as the *common enemy*  
of



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of *Russia* and *France*. With respect to the oil, which is said to have been thrown overboard, it must be referred to the registrar and merchants, to report, whether any or what part of this oil was thrown out, for the benefit of the ship and the rest of the cargo.

Salvage decreed.

### THE APOLLO, BOTTCHER Master.

Jan. 15th,  
1802.

Contraband—  
Extent of the  
relaxation on  
this subject.—  
Hemp, to *Am-  
sterdam*, the  
produce of  
*Russia*, and the  
property of a  
Russian mer-  
chant, not con-  
traband—al-  
though not on  
board a *Russian*  
ship, but taken  
in the vessel of  
another coun-  
try.

**T**HIS was a question respecting a quantity of hemp, being the produce of *Russia*, and the property of a *Russian* merchant, taken on board a *Prussian* ship, on a voyage from *Liebau* in *Courland* to *Amsterdam*.

*For the Captors, the King's Advocate and Robinson,*  
—Hemp is now, by the law of nations, considered as contraband, unless protected by the particular relaxations which have taken place, or by special articles of treaty. The hemp in question is not so protected, but stands on the general footing. The relaxation which has given greater privileges to neutral commerce, was introduced in favour of the exportation of the produce of neutral countries, *being also* the property of the merchant of the exporting country, and exported *in ships* of that country. Where either of these circumstances are wanting, articles of a contraband nature revert to their general liability to confiscation. In the present case, the hemp is not so documented, as to shew it to be even the property of the exporting country: It is described, only at large, "as neutral  
"property!"

“ property !” Under that description, it might be the property of a *Danish* merchant, and as such, would be contraband, by the direct terms of the *Danish* treaty. On this fact, at least, farther proof must be exhibited. But, independent of that fact, it is submitted, this hemp is confiscable—as not being exported in the ship of the exporting country. The relaxation was introduced, principally in favour of the *navigation* of neutral countries: It was accordingly required, not only that the cargo should be the produce and the property of the exporting country, but also that it should be exported in the bottoms of that country. In the *Jonge Pieter* (a), which was a case of hemp, the property of *Prussian* subjects, exported from *Koningsberg* to *Bourdeaux*, on board a *Dutch* ship, this principle was distinctly averred, in the printed reasons of appeal. It is true, indeed, that case was restored, but not in opposition to this mode of reasoning. *Dutch* ships had been particularly privileged by the treaty of 1674, to trade to ports of the enemy, even notwithstanding they had contraband on board. Owing to that circumstance, the cargo being *otherwise* free, except on the ground that it was *not* on board a *Prussian* ship, might be considered to derive so much protection from the privilege of the vessel; since *Dutch* ships might be taken under the treaty, as privileged to carry on such a trade, and might be considered therefore, to this effect, as the ships of any country from which they were going. In another case in the last war, also, in the *Maria Petronella* (b), it must be admitted that *Russian* hemp on board a *Prussian* ship, was restored. But in that case the cargo was going,

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(a) Adm. Nov.  
12th, 1781,  
Lords, April  
24th, 1783.

(b) Adm. 1789.

The  
Apollo.

Jan. 15th,  
1802.

as was also the *Jonge Pieter*, on a destination to *Bourdeaux*, which is a mere mercantile port. The difference of destination, is a material circumstance, distinguishing both those cases from the present case in which the hemp was going to *Amsterdam*, the enemy's principal port of naval equipment. On these grounds, the restitution which took place in those cases, will not conclude the present question. On the original principle, under which the relaxation was introduced, this hemp is subject to confiscation.

*On the other side, Laurence and Swabey*—The cases which have been cited, are directly in point; and the distinctions which have been attempted, are not sufficient to defeat the application of those precedents to the present case; under the authority of those decisions, the practice has continued, invariably to this day; no instance can be produced, in which articles of a quality bordering on contraband, but otherwise privileged under the relaxation, have been held to be confiscable, merely because they were *not on board a ship of their own country*.—It was farther contended, that the *Russian* treaty, which had been signed in *June* 1801, previous to the sailing of this vessel, was to be taken as removing all doubts on this question, if any could otherwise have been entertained; since in that it is expressly declared, “That such articles shall be free, in *neutral ships*.” This difference, it was said, was observable between the present and the former treaty, that the former only stipulated for the freedom of the navigation of *Russia*, whereas the terms were studiously extended in the third article of the

the present treaty to the *commerce*, as well as the navigation.

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A. P. 10. 10.

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*It was replied,*—That the terms “neutral ships” must be taken, obviously, to mean only the ships of the contracting country, which *should be then neutral* as not engaged in the war.

#### JUDGMENT.

Sir *W. Scott*.—This is the case of hemp, being *Russian* property and produce, put on board the ship of another neutral country, and destined to *Amsterdam*. Hemp is certainly liable to be considered as generally contraband; but in relaxation of the strict principle, the general rule now prevailing, is, that being the produce and property of the exporting country, and going in a vessel of that country, it is not liable to confiscation. The question is, Whether, if it is put on board the ship of another country, that circumstance alone will defeat the relaxation, and leave it unprotected to the consequences of its general character? The Treaty lately concluded with *Russia* must, I think, be laid out of the case. The argument has admitted, that the more ancient treaty included the navigation only: It is said, however, that the late treaty expresses *commerce* also, as well as navigation; but as I understand it, *commerce connected with the navigation*. The extension of the terms is only a more accurate expression of what was before implied. The terms of the other articles of the treaty convince me, that this is the true explanation. The second article stipulates, “That the ships of the neutral power may, &c.”—then comes the

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expression on which the distinction is raised, "on board neutral ships;" that is, *ships of either of the contracting nations, being neutral*: as it is expressed in the *French* version of the same article, "*Sur les vaisseaux neutres.*" If the question rested on this point, I should, without hesitation, express my opinion, that no privilege is conveyed to the mere *Russian* proprietor of the cargo by this treaty, that cargo being conveyed by a foreign bottom. Although the present question does not depend on this treaty, it may not be improper for me to say, in answer to what has been advanced, as the just interpretation of that treaty, that, in my apprehension, it is perfectly clear that the terms do not point to any thing, but what is confined within the navigation of the two contracting Countries.

(a) Adm. Nov.  
19, 1781. Lords,  
April 24, 1783.

The question, then, being abstracted from the treaty, is, Whether hemp, being the produce and property of the country, but put on board the vessel of any other than the exporting country, is liable to confiscation? Reference has been made to the case of the *Jonge Pieter* (a), in which it was decided, that this circumstance did not render it liable to be considered as contraband. In that case, hemp being *Prussian* property, was put on board a *Dutch* ship, and sent to *Bourdeaux*. It did not appear of what country the hemp was, but it was strongly argued, that, by the old rule, contraband affected the ship as well as the cargo; that the relaxation which had taken place was introduced in favour of the ship, and as a concession to the navigation of neutral countries, when employed in the exportation of their own produce or manufactures; that cases which did not

not fall within the reach of this principle, were still subject to condemnation, under the old law ; and on this point, three cases were relied on,—the *Sanc-tissimo Sacramento* (a) ; the *Goede Vreede* (b) ; and the *Juffrow Wobetha* (c).

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(a) Feb. 3, 1781.

(b) March 6,  
1780.

(c) Aug. 8,  
1781. Lords,  
July 18, 1782.

On the part of the claimants it was contended, that the relaxation was not so restricted, as was asserted on the other side ; that the old rule was departed from, and, by the modern rule, neutral merchants were at liberty to export the produce of their own country, on their own account :—That this being allowed, there was no reason why it might not be in other ships, as well as those of their own country, it being equally in the course of their ordinary commerce so to do. Of the cases cited it was said, that the first was a cargo of *Bolognese* produce, sold to a merchant of *Genoa* ; it was therefore *Bologna* hemp, going on *Genoa* account, and liable on that ground to confiscation. The second was a cargo of wheat, sent by a *Swede*, who is by treaty disabled from carrying wheat.—A vehicle, therefore, was used, which it was unlawful to use ; and the total disability of the ship to carry such a cargo, put the cargo into an unlawful state. The third was a cargo of timber from *Dantzic*, which could hardly be, and was proved not to be, in strictness, the produce of the territory of *Dantzic*, but of the neighbouring kingdom of *Poland* (d).—These are

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(d) In the Court of Admiralty, the cargo of the *Juffrow Wobetha* was condemned as contraband August 8, 1781.—On appeal, that sentence was reversed, and the cargo decreed to be restored July 18, 1782.—The Court of Appeal conceiving that *Dantzic*, though a free city, being within the immediate protection of *Poland*, was entitled to export such a commodity as one of its own products.

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APOLLO.

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cases in which the unfavourable determination proceeded upon grounds that have nothing in common with the present case.—But the case of the *Jonge Pieter* was exactly parallel, being the case of a cargo of hemp on board a foreign ship. On that occasion, the Court thought there ought to have been stronger proof that it was *Prussian* produce; but decreed the cargo to be restored.—That case went up to the Lords, where the sentence of the Court of Admiralty was affirmed. It is therefore a direct precedent binding on this Court; and in conformity to that authority, I shall direct this cargo to be restored.

*On the part of the captors*, it was then urged—That the property was not proved; that the hemp was not so documented, as to justify the captors in releasing the cargo, without bringing it to adjudication; that it was described only as “for neutral account,” which it might be, and yet be liable to condemnation; that the presumption was strong against its being *Russian* property, as it was notoriously the practice of *Russian* merchants to export very little on their own account;—that, on these grounds, the captors were, at least, entitled to their expences.

*On the other side*, it was contended,—That the proof had been pronounced sufficient, inasmuch as the Court had expressed a disposition to restore on the original evidence.

*Court.*—It is the case of hemp, which is not an indifferent article, but protected from confiscation, only by being proved to be the property and produce of  
of

of the exporting country. The presumption that it is the produce of *Russia* is strong, from its being exported from that country, of which it is a staple commodity. But the presumption of property arising from that circumstance, is very weak. It is the ordinary practice of all countries, to ship articles very often on account of foreigners. The presumption in this case is still weaker, from the circumstance mentioned in the argument, that it is the known course of trade of *Russian* merchants, not to be, in any great degree, the exporters of their own produce. As to hemp particularly, it is notorious, that the greater part of that which comes hither is bought up in *Russia*, and paid for there. Then what is the proof on board? Merely that it is "for neutral account!" That is not sufficient to express its title to the privilege which it claims. If it belonged to merchants of any other country, exporting articles of this description, and not the produce of their own country, it would be contraband. Then what had the captors to inform them, that it was not liable to seizure? There could have been no more than the master's representation, and that not on oath, and not supported by the ship's papers. Considering that it is not an indifferent article, that it is absolutely necessary that the property should be stated to entitle it to be considered as innocent, and that no sufficient account is given of the property, I think it is a case for farther proof.

Farther proof being admitted, the cargo was restored, on payment of captors' expences.

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1802.

THE



Jan. 31st,  
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### THE CHRISTINA MARIA, KEHNROCK Master.

Pitch and tar, the property of a *Swedish* merchant, and the produce of *Sweden*, taken on a voyage from *Sweden* to a *Dutch* port, and on board a *Swedish* ship—not contraband,—restored.

**T**HIS was a case of a cargo of pitch and tar, being the produce of *Sweden*, and the property of a *Swedish* merchant, taken on board a *Swedish* ship, on a voyage from *Stockholm* to *Blockziel*, Aug. 2, 1800.

Restored (a). The expences of taking the depositions were allowed to the captor.

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### THE VRIENDSCHAP, BARENDs Master.

Evidence. Depositions of the claimant in a former case, in which he was owner and master of the vessel, invoked by the captor.—Objection overruled.—Evidence admitted.—Restitution. Adm. Aug. 1, 1800.

**T**HIS was a case of a ship claimed for Mr. *Tadsen*, describing himself as resident at *Hooge*, on which farther proof had been ordered, on a preceding day.

*It was now argued, on the national character of the claimant,*—That notwithstanding he was described as of *Hooge*, it appeared from his own deposition, in the *Fortuna*, *Tadsen*, of which ship he was both owner and master, that he had been employed constantly in navigating to and from the ports of *Holland*.

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(a) In the *Resolution*, Feb. 11th, 1802, a cargo of pitch and tar, from *Stockholm* to *Leghorn*, on board a *Swedish* ship, and claimed for merchants of *Stockholm*, restored on the original evidence.

The cargo having been taken by government, the expences of the claimant were decreed to be paid by government, restitution having passed on the original evidence. The captor's expences were also directed to be paid by government.

*Laurence, on the other side, objected*—That it was not admissible, according to the rules of evidence, to invoke *depositions* from other cases; that in this instance it was still more unwarrantable to advert to them, even without invoking them.

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*Court.*—The depositions alluded to, are the depositions of the claimant himself. I am of opinion that they are therefore fit to be used, not as decisive of this case, but as evidence not improper to be taken in conjunction with that which this case affords.

On the result of the evidence laid before the Court,

#### JUDGMENT.

*Sir W. Scott.*—During the time this person was engaged in *Dutch* navigation, he is liable to be considered as a *Dutchman*; and that, not only in respect to the particular vessel in which he was employed, but also in respect to other vessels belonging to him, that had no distinct national character impressed upon them. I do not mean to say, that if he had a house of trade at *Hooge*, from which a trade was carried on to other ports of the north, his employment in *Dutch* navigation would necessarily affect that particular and distinct commerce; but it would, I think, spread its consequences over his affairs generally, and on such of his property as might be employed in a course of trade, that had no distinct national character belonging to itself. This person appears, not only to have been engaged in *Dutch* navigation, but to have been very much resident in *Holland*. It is not an occasional visit to *Altona*, or *Hooge*,  
that

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that will continue his native neutral character to him. He appears to have gone to *Altona*, *November* 1797, and to have returned again to *Holland* in *Jan.* 1798. So again he goes in *March* 1798, and returns in *April*. It is not such fugitive visits as these, to the place of his birth, that will entitle him to retain the benefit of a neutral character, in opposition to a regular course of employment in the enemy's country and trade. Such a pretension would be utterly inconsistent with the rules which this Court is obliged to lay down, in ascertaining questions of domicile. The former part of the history of the ship, in the present case, is such as, according to the received principles of this Court, would impress a *Dutch* national character upon her. In the latter part, there are some voyages between neutral ports, but still, nothing to fix a *Danish* character, or to prevent her from being considered as property, that has no peculiar and distinct national character impressed upon it. It is said, that Mr. *Tadsen* has discontinued his residence in *Holland* since 1798: If that be so, it may be a material circumstance in his favor. It would, certainly, be very satisfactory to the Court, to know where Mr. *Tadsen* has been since the date of his last affidavit, and I shall give him an opportunity of stating it.

Farther proof ordered to be made.

(a) April 28th,  
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On a subsequent day(a), this ship was restored, farther proof being made to the satisfaction of the Court.

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THE MADONNA DEL BURSO,  
ANTONOPOLI Master.

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**T**HIS was the case of a ship and cargo belonging to Greek merchants, seized Nov. 1797, in *Dingle Bay*, by *Edward King Hill*, commander of a revenue cutter, and proceeded against, in the first instance, in the Court of Admiralty of *Ireland*, as droits and perquisites of his Majesty in his Admiralty of *Ireland*—on a suggestion, that the ship and cargo were bound to *Amsterdam*, in opposition to the ostensible documents, representing a destination to *Hamburgh*—that the master had been guilty of a suppression and spoliation of papers, and that the property actually belonged to enemies.

Case of loss—  
Demurrage—  
Compensation,  
&c.

A claim was given for the ship, by the master, and for the cargo, by Mr. *Barthold*, the correspondent of the proprietor, on a supposition that the Court of Admiralty of *Ireland*, was properly competent to entertain the question. But afterwards, on farther consideration and advice, an exceptive issue was tendered, on the part of the claimant, objecting, “ that the Court of Admiralty of *Ireland*, as constituted under the act of the 23d and 24th of his present Majesty, had no power or jurisdiction to proceed on any manner of captures, seizures, prizes, or reprisals of any ships or goods, that shall be taken in the ports or creeks of *Ireland*, &c.” on these grounds, a prohibition was obtained in the Court of Chancery of *Ireland* inhibiting the Judge of the Court of Admiralty from proceeding

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(a) April 23d,  
1799.

ceeding farther. A short time previous to the final order (a) of the Court of Chancery, making that rule absolute, the King's Advocate directed the proceedings in the Court of Admiralty of *Ireland* to be discontinued; after this discontinuance, farther time was consumed in an action entered by the claimant of the cargo, against the officers of the Court of Admiralty, in the King's Bench of *Ireland*. That action was afterwards dropt: and in *March* 1801, proceedings were instituted in the High Court of Admiralty of *England* by the Proctor of the Admiralty, against the goods and merchandize laden on-board the ship, but not against the ship herself. The libel against the ship had been withdrawn in the Court of Admiralty of *Ireland*, and she had been directed to be restored; but owing to the state in which she then was, the master declined to take possession.

#### JUDGMENT.

Sir *W. Scott*—This is the case of a ship which is unquestionably *Ottoman*; she is not at present proceeded against, as I understand, in this Court; and though proceeded against in the Court of Admiralty of *Ireland*, yet she was directed to be restored upon the original proof. This ship coming from the Eastern part of *Europe*, was forced, by stress of weather, to put into *Dingle Bay*, in *Ireland*, and was there seized by the master of a Custom-house cutter, *Edward Hill*, in *November* 1797, the cargo being intended for *Amsterdam*, with an ostensible destination to *Hamburgh*.

The Court has, upon a full inquiry into the proofs of property produced, weighing all the suspicions which

which the imprudence, and improper conduct of the parties, and their agents, had thrown upon it, finally pronounced itself satisfied, that the cargo belongs to the *Greek* merchants, for whom it is claimed. The present question is upon the detention, and damages occasioned by the detention of this ship and cargo.

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It does not appear that any proceedings were commenced against this ship, or the valuable cargo, which she contained, until the latter end of *February* 1798, that is, for the space of above three months. However justifiable the seizure may have been, the first obligation which the seizer has to discharge, is that of accounting, why he did not institute proceedings against this vessel and cargo immediately; and unless he can exculpate himself, with respect to delay in this matter, *he is guilty of no inconsiderable breach of his duty.* It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of our own, if any persons, commissioned or non-commissioned, could lay their hands upon valuable foreign ships and cargoes in our harbours, and keep their hands upon them, without bringing such an act to judicial notice in any manner, for the space of three or four months. The complaints, which such a conduct tolerated by this country, would provoke against it from foreign countries, are not to be described; and it is not very easy to suggest, how the real honour of the Country, connected as it is with its justice, could be defended against such complaints.

The general duty of attending to considerations of this nature, becomes more peculiarly incumbent on the subjects of this country, in respect to vessels sailing under the protection of the *Ottoman Porte*—a State long

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long connected with this country by ancient treaties, and at the present day, by engagements of a peculiar nature. Independent of such engagements, it is well known, that this Court is in the habit of shewing something of a peculiar indulgence, to persons of that part of the world; The inhabitants of those countries are not professors of exactly the same law of nations with ourselves; In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition, not to hold them bound to the utmost rigour of that system of public laws, on which *European* States have so long acted, in their intercourse with one another. But let it not be represented, as it has been thrown out in argument, that the Court has done, in this instance, what it would not have done in any other case; The Court has done no more, than it was bound to do in this whole *class* of cases; with respect to which, it has been repeatedly laid down, that all the rules to which the *European* States are properly subjected, cannot be rigidly applied. So attentive is the Court to the peculiar nature of these cases, that it never entertains them at all, without notice given to the *Ottoman* Minister, and to the *Turkey* Company; and when questions, in which merchants of those countries are interested, are brought for its adjudication, it certainly decides with that sort of indulgence, which would be very much misapplied to the cases of such individuals, as are the subjects of the Christian States of *Europe*. Let it not therefore go out to the world, that in this case the Court has, in any manner, over-leaped its accustomed practice.

These considerations should have imposed on the  
seizor

seizor a peculiar degree of caution ; a caution which ought to have accompanied his proceedings in every subsequent stage, even if the original seizure had been ever so justifiable. Let us then see what case is set up, for not having instituted any proceedings, for considerably more than three months. All that I have heard is, that the seizure was made in *Dingle Bay*, and that this is a place very far from *Dublin*. How is this to excuse him? Suppose an *English* custom-house officer, had made a like seizure in *Polperry Bay* on the coast of *Cornwall*, or in *Pulwhelly Bay*, on the coast of *Wales*, much more remote from *London*, than *Dingle Bay* is from *Dublin*, would this Court endure to hear him assign that distance, as any excuse or justification, for not proceeding for three or four months? What steps were taken to obtain legal advice? For it is the first and universal duty of those who do not know how to proceed, to apply to those who do. Mr. *Hill* writes, it is said, to the Commissioners of the Customs, to acquaint them with what he had done. I do not say, that this was an improper step for a man to take, who is answerable to his superiors for the propriety of his general conduct; but is this all that he ought to have done? Is it the most important part? Ought he not to have given immediate notice to the officers of the Admiralty, that he had seized a ship and cargo as droits of Admiralty. The Commissioners of the Customs have nothing to do with such droits, as they very properly tell him in their answer. He might just as well suppose, that he had satisfied his duty, by writing upon such a matter to officers of any other description. I do not impute it to him, that he did not write to this Country, to the *British* Admiralty Court, or to any of its officers

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cers. It would be too much to expect, that he should have taken upon him to decide, upon a matter on which persons of learning may entertain different opinions. If he had applied to the eminent persons in the Court of Admiralty of *Ireland* in due time, he would have completely assoiled himself; what I impute to him, as gross misconduct, is, that he did not apply to them, till after he had kept this *Ottoman* ship, with a cargo of great value, in this open bay, during the extremity of the winter season, exposed in the manner that such a ship and cargo must be exposed—and all this upon his own private opinion, without putting himself in motion to obtain proper advice, till some time, according to his own account, in the month of *February*. I am surprised to hear of any defence that can be set up for such conduct; in truth, all the defence that I have heard, is the words “*Dingle Bay*,” and “that he did not know how to act in such a remote place.” To which I have to answer, that they who do not know how to act upon such seizures, ought not to venture upon making such seizures. He ought to have kept his hands off, or resorted to good advice, as soon as he laid them on. If he will not do the one or the other, he must be the sufferer; I have no doubt in pronouncing a demurrage against him, for conduct utterly inexcusable, particularly connected as the case is, with the national character of this vessel. In estimating the quantum of demurrage, I shall allow him the benefit of so much time as would be necessary for transmitting the papers to *Dublin*, and obtaining advice thereon; recollecting how much those eminent persons are involved in business of various kinds, I shall allow him the benefit of full three weeks, for these communications with  
*Dublin.*

*Dublin.* The allowance is, I think, liberal; for though I have heard much said of the distance of *Dingle Bay*, which I do not observe to be so very considerable, I cannot doubt that it has a very open and constant intercourse with the capital. Beyond these three weeks, I hold Mr. *Hill* liable in demurrage.

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It has been thrown out in argument, that the same delay would have taken place, and therefore that the same harm would have happened, if the ship had been proceeded against here. This, if true, is small satisfaction to the claimant; but how could it have happened in fact, unless the seizor was guilty of the same delay, in which case he would have been answerable in the same manner? Would this Court tolerate the act of a custom-house officer, keeping a foreign valuable ship for such a length of time, in such a situation, without any proceeding? The very first step taken, would have been to call upon him to justify his conduct, be the ship and cargo what they might. If such a seizure had been made here, what would have followed? The depositions would have been immediately taken, and sent up along with the ship's papers, or possibly the ship's papers alone, with some account of the circumstances of the behaviour of the captain, and these would have been immediately submitted by the Proctor of the Admiralty, to the Counsel for the Crown, in order to obtain their instructions. I cannot but think, that the case would have immediately appeared to them a case for restitution of the ship, and a case of suspicion, of *vehement suspicion*, respecting the cargo—a suspicion principally excited by the behaviour of the master, and the false representation of the

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the voyage, contained in the papers, but not amounting to a conclusive demonstration of the total falsehood of the claim. The effect of such misconduct would justly have operated to the forfeiture of freight and expences, on the part of the ship. But an order for further proof of the cargo would, I presume, have been consented to on the part of the Admiralty. If the matter had taken this course, a fortnight might have been sufficient for the dispatch of the business ; the cargo would have been delivered upon bail to the claimant, or, if he declined taking it, would have been taken possession of by the Admiralty, and have been brought to a port of security, perhaps in this same vessel, and there sold at a good market, for the benefit of those who might be ultimately entitled. The ship might have gone about her business, with her master and crew unbroken, with her stores unbroken, and with some little advance of money, arising from the new freight, for the necessity of her homeward voyage. All the inconvenience sustained, would have been the delay of payment for the cargo, if proved to be neutral, and the forfeiture of the original freight for the ship—inconveniences not to be complained of by those, who had brought them upon themselves, by prevaricating documents respecting the voyage, and by the rash and intemperate conduct of the master entrusted with it. At any rate, the matter might have been dispatched within a time much short of that, in which this ship and cargo lay, without being brought to the notice of any Court whatever.

This, I think, is the natural course which the matter, according to my apprehension, would have taken ; because nobody has disputed, any where, that I know of,  
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the neutral ownership of the vessel; and nobody, that I know of, has contended any where seriously, that the cargo was liable to absolute condemnation, upon the original evidence, though liable to very malignant suspicion. But suppose that the Counsel for the Crown had thought it their duty to take the opinion of the Court upon the cargo in the first instance, (as they might not improperly have done,)—In that case, it is said, “a delay must have taken place, because this Court would have felt great delicacy, in proceeding upon a ship and cargo lying in a port of *Ireland*, on account of the unsettled question of jurisdiction;” Certainly nothing could be further from the inclination of this Court, than to encounter the hazard of any thing like a conflict with the sister jurisdiction of *Ireland*. But still the neutral is not to suffer on that account; he would have his claim upon the government of the two countries. A Belligerent Nation which is in the exercise of these rights of war, is bound to find tribunals for the regulation of them—tribunals clear in their authority, as well as pure in their administration; and if from causes of private internal policy, arising out of the peculiar relation of the component parts of the Belligerent State, difficulties arise, the neutral is not to be prejudiced on that account; he has a right to speedy and unobstructed justice, and has nothing to do with such difficulties, created by questions of domestic constitution.

It is then said, “that the mass of business under which this Court was then labouring, so choaked up the avenues to justice, that the cause if entertained by the Court, could not have been heard for a considerable time.” If it went upon an order for further proof

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by consent, there would have been no necessity for such a hearing; but if not, still it is no secret, that this Court has never thought it a breach of that equal justice which it owes to all its suitors, to suffer a cause to be interposed, that, from its magnitude of interests or other circumstances of just weight, had a peculiar claim to a pre-audience. By the counsel for the claimants, it has been asserted, that an order was sent to the Court of Admiralty in *Ireland* by the government, for the release of this ship and cargo, and that obedience to that order was declined by the Court, upon an opinion, that the Court itself had an interest in these droits. How these facts stood, I am not sufficiently informed by these papers; it seems rather difficult to reconcile such an order from Government, with the prosecution at present maintained against this cargo; but if such an order had been sent to this Court, it certainly would have met with an instant obedience; because the Crown having the only beneficial interest in droits here (the seisor having nothing but a mere expectation of bounty), and the Crown having an undoubted right to exempt from the operations of war any individual subject of the enemy himself, this Court would, in pursuance of such an order release the property, although it directly appeared to be an enemy's property. If the Court of Admiralty of *Ireland* had an interest of its own in such droits, which has been repeatedly thrown out in argument, that might properly produce a different conduct on the part of that Court; if it has such a right, it is I presume by virtue of some special grant; for this Court possesses no such interest, and is not aware of any possible ground, on which a Court of Admiralty can, by virtue of its mere general constitution, claim it.

Respecting

Respecting the next demand, the claim of actual damage done to the ship, during the time she continued in Mr. Hill's possession, I have to lament, that it is not brought before me in a more satisfactory manner. What the parties ought each to have done, for their own security, *after the restitution*, was, to have had an accurate survey taken, and an authentic report made of her state and condition. But neither the one nor the other have done what might have been reasonably expected from both. That *some* damage was sustained before proceedings were commenced, cannot be doubted upon the general face of the facts:—Here is a valuable ship exposed in this bay, during the whole extremity of the winter season, in the neighbourhood of a country described to be semi-barbarous, her master turned out of possession, and the crew, a parcel of *Greek* sailors, without any superintendence! Is it to be supposed, that, in such a state, there was no deterioration, no waste, no spoil, no embezzlement? I therefore pronounce for damage *generally*, referring to the Registrar and merchants to consider the *quantum*, as well as they can ascertain it by affidavits to be exhibited on either side, with liberty to resort to the Court on any matter of difficulty. So much for the claims of demurrage and damage against Mr. Hill personally, while the vessel continued under his hand, without the institution of any proceedings whatever. Of what passed afterwards, it is my inclination as it is my duty to speak with all delicacy and caution.

Proceedings were instituted against this property, as a *droit* of Admiralty, in the Court of Admiralty of *Ireland*. They depended long: I have not looked particularly into them, having no right to exercise any

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particular judgment upon them. But I understand that the proceedings of the Court were finally inhibited by a judgment of the Court of Chancery in *Ireland*; and the fact is, that a proceeding *de novo* is commenced in this Court of Admiralty. The legal conclusion appears to be, that the proceeding in the *Irish* Court of Admiralty was *coram non judice*; for I must regard that judgment of the Court of Chancery, as decisive upon this matter, as much as I should be bound to do a like judgment of inhibition of the Court of Chancery in *England*, upon any proceedings of this Court, even if I should be presumptuous enough to entertain any lurking difference of private opinion, upon the rectitude of that judgment. But supposing the proceedings to have been *coram non judice*, still I am far from insinuating, that they were commenced from error, on the part of those who advised them; knowing the high character of the persons concerned, I consider these proceedings as arising out of an unsettled state of things, in which these gentlemen could not consider themselves, as conscientiously and honourably at liberty to abdicate their claim of jurisdiction, in the first instance. But I must revert again to the principle I have laid down, that the neutral is not to be prejudiced by that; it is no business of his to settle the points of constitution, or fight the battles of conflicting jurisdictions; he is charged with having submitted to the jurisdiction, but how could he help following the proceeding into that Court? If he had even instituted the proceeding himself, I do not think that a foreigner applying to a Court of apparent competency, which entertained the suit, would have barred himself as an author of his own wrong. But he only followed where he was led; and if he has been  
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put to expence in consequence of proceedings in a Court which could not do him justice, but which entertained the suit, not from any error imputable to the Court itself or its practices, but from the unsettled state of jurisdictions in the two countries;—I will not call it a *damage* which he has sustained, but it is that, for which he appears to have something like a conscientious demand, against the government of one Court, or both.

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In the course of this discussion it has been repeatedly asked, why did not this man take away this ship as soon as she was released? The situation of the man is itself an answer to the question. Here is a person utterly unacquainted with the laws and language of the northern and western ports of *Europe*, detained in this remote bay of *Ireland*, without any agent to apply to (for Mr. *Barthold* was only the agent for the cargo, and all that he did for the ship could be mere charity or prudence), without a sixpence in his pocket, or credit upon the cargo, which was separated from the ship, and subjected to a proceeding. How was this *Greek* master in *Ireland*, in as helpless a state as a foreigner can be conceived to be placed in, to repair his ship after twelve months' detention, to victual her, to store her, to collect his dispersed crew, and to satisfy their pressing demands, and to set out on his return to *Constantinople*? It appears to me rather harsh language to say, that he should have gone about his business, without pointing out the means by which he could do it. It is telling a man to walk without legs. The consequence has been, that the ship has been lying rotting in *Dingle Bay*, and he himself lying rotting in a prison, and the ship has been finally sold for a mere nothing. In all this there is something which



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I will not call *damage*, but which founds a highly equitable claim of compensation.

Then as to the cargo, it has been sold to great disadvantage, it is said much below its original value.—Something of damage must have taken place in respect to the cargo, which I refer generally to the Registrar and merchants. I observe that 4000*l.* has been received in *Ireland* for duties, and is retained; a fact which I do not immediately know how to reconcile with the fact, which has been repeatedly asserted, and not denied in this discussion, that the government of *Ireland* did, in an early period, issue an order for the release and restitution of the whole property.

It has been contended, that all the loss and all the inconvenience has been produced, by the misconduct of the parties themselves, by the bills of lading, which held out a false destination, and by the master's destruction of some papers. The practice of holding out a false destination, (which in this case is sworn to have been done at the instance of the insurers), is unquestionably a bad practice, founded on a silly and dangerous policy, and penal to the party who employs it. But when I consider how familiar it is in the practice of other nations, and that even when it occurs there, it is not held, absolutely and conclusively, to bar the admission of farther proof, unless the falsehood is supported by a concurrent falsehood of the depositions, or by other circumstances of grave suspicion,—can I say, that in this case, where the master avows, upon his deposition, the real voyage he was to pursue, that it is to have more than its ordinary effect, particularly, connected with the habitual indulgence shewn to the subjects of the *Porte*? Can it justify the detention for such a length  
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of time without any proceeding?—and all the expence of proceeding in a Court, which eventually is declared to have no founded jurisdiction? and all the waste of property consequent upon both these causes? Again; the captain destroyed papers after the seizure—a most rash act; but what is the penalty? a forfeiture of his freight and expences in ordinary cases, a diminution of his credit, greater or less, in proportion to the motives under which he appeared to have acted, and a necessity for further strict proof—not the destruction of the ship by a ruinous detention; The Master swears, that he destroyed these papers after the capture, which contained nothing of consequence more than the real destination, and that he did this in a fit of passion, for which he was condemned by his mate, upon the seizure. Agitated by the difficulty in which he was involved, conceiving himself to be oppressed, and subject to that irritability of temper, to which the people of his country are peculiarly liable, he committed this rash act. In such a case, supposing the parties to be of the ordinary description, the Court would have punished the act, by condemning him in all the expences of the captors, if the cargo was eventually restored, and by refusing him his freight and expences if it was condemned, and there the matter would have ended.

Upon a full and deliberate investigation, conducted with the most jealous attention, I have finally restored the property of the cargo, and in the case of an ordinary *European* master, who had nothing to complain of, I should have followed that sentence, by a sentence condemning him in the captor's costs. But I must consider here, how much this man and his owners have

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have already suffered beyond the extent of that penalty—That these acts of misconduct ought to entail on the parties, all the accumulation of wretchedness which has been produced, I think it is impossible to maintain for a moment.

Upon these considerations, I think there is much of what I shall not call *damage*, but a loss which calls for compensation; I shall refer it to the Registrar and merchants to consider what has been the undue diminution of the value; adverting likewise to the expence of proceeding in *Ireland*, and to the payment of the duties. The distresses of the master render him a just object of the compassion of government. It has been repeatedly said by the officers of the Crown, that Government will very willingly attend to any recommendation from this Court, and I am happy to find that it will do so. At present it is not necessary for me to do more, than to refer the *quantum* of loss to be ascertained by the Registrar and merchants. I am induced to hope from the declarations I have just alluded to, that it will be unnecessary for me to advert to a question, to which my attention has been repeatedly forced, in the course of this discussion, how far the Crown acting not upon its own prerogative rights, but in the office of Admiralty, can be made at all answerable for damages, accruing to property in the hands of its officers? I shall only say generally, that I shall enter on such a question, if compelled, with all the reverence which is due to the rights and interests of the Crown, and with all the regard due to that justice, which is demanded, on the part of other governments, and their subjects.

R E P O R T S  
OF  
C A S E S  
DETERMINED IN THE  
HIGH COURT OF ADMIRALTY,  
S. C. S. C. S. C.

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THE PEACOCK, CROFTS Master.

*Feb. 5th,  
1802.*

THIS was a case of an *American ship*, with a cargo of wine, taken *May 1801*, on a voyage from *Cadiz to London*, but bearing an ostensible destination to *Altona*.

Costs and  
damages.  
Prize carried to  
*Lisbon*, and im-  
properly detained  
there.

*For the captors, the King's Advocate and Sewell contended, — that Cadiz was to be considered as a blockaded port de facto, though no public notification had appeared ; that it was so understood by the cruizers on that station, and also by the merchants of Cadiz, by whom a reference was made to the state of Cadiz, as a blockaded port, in several letters, both in this and other cases. That if in the opinion of the Court this blockade should appear not to have*

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been so enforced, as to subject the property to confiscation, it would at least justify the captors in bringing such a case to adjudication, especially since the ship was going under false papers, and there had been a spoliation of papers, at the time of capture.

*On the part of the claimant, Arnold argued, — that there was not only no cause of condemnation, but that the captors had been guilty of such misconduct, as to entitle the claimant to costs and damages. That the spoliation of papers complained of, was occasioned by the captors themselves coming down, and firing under French colours; that the papers were merely letters from American sailors in Cadiz, to their friends in London, and destroyed, only lest they should betray the real destination to London. That if captors were justified in resorting to false colours, as an allowable stratagem of war, they must at least not impute to the claimant the destruction of papers produced by it, as a fraudulent spoliation. It was farther said, that the claimant had sustained considerable loss by the captor's carrying the ship to Lisbon; and that, as to the blockade of Cadiz, no such thing was known to the English Consul at Lisbon, as appeared from his declaration in one of the papers. The Court reserved the case for further consideration.*

*February 6th.*

#### JUDGMENT.

Sir W. Scott. — This was an American ship and cargo of wine, taken on a voyage from Cadiz to London,

*London*, on the 19th of *May* 1800, and carried into *Lisbon*, where they were detained a long time, though no proceedings were commenced till they were afterwards brought to *Jersey*. The depositions of the master, and the ship papers were brought in, and the parties seem to have consented to an order for farther proof, though there was, I think, no great doubt arising on the question of property. The master speaks positively in his deposition, and, I am to suppose, would speak in the same manner on being interrogated by the captors; the documents concur in representing the vessel as an *American* ship, and the master verifies the property of the cargo, alleging, as his means of information, that it was purchased by the proceeds of the outward cargo. The only circumstance that could have raised any suspicion was, that some papers were thrown overboard; but the account given of this circumstance is, that they were letters of *American* sailors, directed to their friends in *London*, which might have betrayed the real destination to a *French* captor, and have led to condemnation in a *French* Court; and it is to be remembered, that the privateer came down under *French* colours. This is called a spoliation of papers, but how produced? By the privateer's sailing and firing under false colours. To sail and chase under false colours, may be an allowable stratagem of war, but firing under false colours, is what the maritime law of this country does not permit; for it may be attended with very unjust consequences; it may occasion the loss of the lives of persons, who, if they were apprized of the real character of the cruiser, might, instead of resisting, implore protection.

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The ship was going to an *English* port, with papers for *Altona*, taken for the purpose of avoiding *French* cruizers. It is said, that there is a paper on board, containing instructions of the owner, contradictory to the pretended voyage to *Altona*, and importing a voyage to *London*, and therefore that the excuse for the false destination, viz. "that it was done to avoid *French* cruizers," cannot be true. But the fact is not so, the instructions are only provisional, "If you go to *London*," giving the master a discretionary power, and not binding him to go to *London*. This would never have amounted to a contradiction of the ostensible destination, even in the judgment of a *French* privateer; then what is there in the clearance to *Altona* to excite suspicion, since it is notorious that a clearance could not be obtained for *London*, being an enemy's port; the utmost that this circumstance could have justified, would be the bringing in for farther enquiry.

The captain of the privateer appears to have thought, that it was not lawful to bring wine from *Spain* to *London*. It is difficult to conceive how such an opinion should prevail at *Guernsey* in particular; but if it was really a prevailing mistake, it is one for which he is answerable, as he ought to have been better informed. Other pretences are set up. It is said, that the ship was detained chiefly on account of the blockade of *Cadiz*. The master's affidavit states, "that he went to *Lisbon* in order to obtain information respecting the blockade," which, in fact, is not contended now to have existed. It appears, and it is not contradicted, that this privateer, and other *Guernsey* privateers, received instructions from their  
owners

owners to bring in all ships coming out of *Cadiz*. It has been asked, in argument, if a different law is to be applied to *Guernsey* privateers, from what is applied to King's ships? The owners of these privateers certainly seem to have laid down a different law for themselves, in giving to their captains such directions as are not authorised by the public instructions of the Country. If they take upon themselves to give such orders, they must bear the consequences which they have so wantonly incurred, when they might, by application to the Admiralty, have learnt whether they were authorised by the public directions or not; the mischief that might result from such a conduct is incalculable. — Then what is there in the other circumstances? — Nothing but the general suspicion, that the voyage was to *London*, in contradiction to the ship papers. I think the explanation given on board might have been sufficient to convince the captors that they would run no great risk in releasing this vessel. There is, however, an additional circumstance, that the master informed the privateer, that he had the day before been stopped and searched by Admiral *Duckworth*, and dismissed, notwithstanding he came from *Cadiz*; from which it might have been inferred by the captor, that in the opinion of Admiral *Duckworth*, *Cadiz* was not under blockade.

Supposing that the captors were justified in bringing in, to see if this representation of the false destination was true or not, what ought they to have done? The capture was made in lat. 42. considerably to the north of *Lisbon*, the wind being then fair for *England*. It was their duty to have brought the prize directly to *England*; for if the public instructions

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tions give to captors the power of coming to the most convenient ports, they do not give them a wild and arbitrary discretion, but a discretion to be soundly exercised, on a due consideration of their own convenience, and of the interest of the neutral persons that may be concerned; instead of carrying the ship back to *Lisbon*, for which place the wind was then adverse, and from whence it would require several winds to bring her into the same situation again, they should have proceeded directly for *England*. It appears, that the master remonstrated to this effect, but in vain; the excuse which the captor makes is, "that he went to *Lisbon*, to enquire if *Cadiz* was under blockade, that he might release the ship, if he found that not to be the case; but that on application, he was told by the *British* Consul, that Lord *Keith's* letter was still in force." The account given by the neutral master is very different; he says, "that he went with the captain of the privateer before Mr. *Arbutnot*, the *British* Consul, who expressed his surprize, and told him that he had no knowledge of any blockade of *Cadiz*, as against neutral ships." The affidavit of the captor makes no mention of this circumstance, but states, "that he was told that the blockade was not repealed." When the Consul at *Lisbon* expressed his entire ignorance of the blockade, it ought to have satisfied the captors on that point, and, in all probability, it would have satisfied them, if they had not been previously instructed by their owners "to bring in all ships coming from *Cadiz*."

After all this, no proceedings are commenced to take the depositions.

[*King's Advocate*. — There is no standing commission to examine witnesses at *Lisbon*.]

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*Court*. — I know that ; but in several instances, the Court has determined on affidavits taken at *Lisbon* ; and in a case like the present, the affidavit of the master ought to have been sufficient. Another reason given for this delay is, “ that they waited for an opportunity of sending the vessel to *England* under convoy.” Whether they sailed under convoy at last or not, does not appear, but they did not fail for six weeks. It is the duty of privateers to bring their prizes home to a port of this kingdom as soon as they can. King's ships may reasonably be allowed a greater latitude, as being frequently attached to stations which they cannot leave. It may sometimes be necessary for them to send their prizes to *Lisbon* ; and in some cases, I will not say that it may be absolutely improper for privateers. But it cannot be so necessary, and unless some very particular reason intervenes, it is their duty to bring their prizes home as speedily as possible, unless they carry them to the port of *Gibraltar*. If that had been done, the utmost inconvenience that would have been sustained, would have been the loss of their prize. It is said, that the privateer wanted to refit — Is that a reason why a neutral vessel should be detained in a distant port, because the privateer chuses to refit ? Or is it enough to say that the privateer would lose her cruise ? That is a condition to which persons engaging in such an adventure must submit.

But it is urged in defence of the captors, that an offer was made to restore on bail, which it is said would have the effect of discharging all the conse-

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quences of this detention; and that the master, not having accepted this offer, the captors are exonerated. So far is this from being a defence, that, in my opinion, the privateer had not a power to make such an offer; captors are not at liberty to carry prizes into a foreign port, and there take bail, instead of bringing them to a port of this kingdom. Some instances have been alluded to in which King's ships have done this. There have, I believe, been very few of this kind, and those on distant stations in the *Mediterranean*, or where the King's ships could not leave their stations. In those cases, though it was undoubtedly an irregularity even there, the Court overlooked it on the ground of the evident necessity: but when captors are under no such necessity, it is a very different thing. The master would have acted very unwisely if he had taken his ship on the terms proposed; he was required to take the ship and cargo, and to bring her to *England*, on his own risk. Suppose his ship had been captured by the *French*, in the course of that voyage, still the captain of the privateer would have proceeded against the bail, and thus by taking on bail, the master would have exposed the property twice over. The master was, in my opinion, under a necessity of refusing such terms; and therefore the offer amounts to nothing, and does in no degree exonerate the captors.

All this inconvenience would have been avoided, if the captain of the privateer had done his duty, and brought the ship and her cargo to a port of this kingdom. Depositions would have been taken to the effect which now appears. The account given of the destination might have been verified, on  
 applica,

application to the *British* consignees, or by the production of letters. Can I entertain a doubt, that on the disclosure of the fairness of the whole transaction, advice would have been immediately given to release? Instead of that, time having been lost, it became necessary to consider how the captors might evade the consequences of such improper detention. Farther proof was called for, and other reasons were resorted to for a defence.

Under these circumstances, I feel it impossible not to pronounce, that the privateer has acted improperly, in carrying the vessel into *Lisbon*, and keeping her here so long. I do not say that the original seizure was wrongful, or that the privateer would not have acted with perfect correctness, if she had brought the ship to *England*, and instituted proceedings here. The captors not having done that, but having carried her to *Lisbon*, and detained her there unnecessarily for such a length of time, I am of opinion, that they are liable to costs and damages; deducting the expences, which would have been incurred, by proceeding here, and also so much time as would have been necessary for that purpose.

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PRACOCK.

Feb. 5th,  
1802.

THE FORTUNA, QUEST Master.

Feb. 5th,  
1802.

(Instance Court.)

THIS was a case of a *Danish* vessel found derelict on the *English* coast.

Derelict, 2-5ths given.—Plea of Precipitation on the part of the master and crew, over-ruled.

For

The  
FORTUNA.

Feb. 5th,  
1862.

*For the Salvors, Swabey and Robinson. — On the other side, the King's Advocate and Sewell argued, —*

That the ship had been hastily and precipitately deserted by her crew, when there was no real danger; that it was not to be taken as a case of high salvage, nor as a case of derelict: that the salvors had incurred no danger, and little trouble.

#### JUDGMENT.

Sir W. Scott. — This is clearly a case of salvage, and, I think, of derelict. It is said, that the master and his crew left the ship with too much precipitation, and that there was no danger. I cannot give credit to such a representation, in opposition to their own conduct. They thought otherwise at the time, and they must be supposed to be the best judges of their own safety. The salvors, it is said on one side, incurred no danger; whilst, on the other side, the danger is perhaps a little exaggerated. They went out however, it is to be observed, for the very purpose of saving vessels in distress, a circumstance to which the Court always pays attention. The subsequent conduct of the salvors appears also to have been perfectly unimpeachable. They brought the vessel immediately into *Harwich* harbour, and delivered up possession to the officers of the Customs. If there had been any considerable danger attending the act of salvage, I should have given what the Court is in the habit of giving in cases of derelict, an entire moiety. As I think there was not much of that ingredient, I shall give only two-fifths.

Total value of ship and cargo, 1900*l*.

THE MADONNA DELLE GRACIE,  
COPENZIA Master.

Feb. 1806,  
1802.

THIS was a case of a quantity of wines appearing to have been purchased in *Spain* on behalf of a *British* subject, under particular circumstances, and taken on a voyage from *Barcelona* to *Leghorn*.

Trade with an enemy.—Exception to the general rule. Shipment in the enemy's country, on part of a person having been resident in Spain, as a British consul, and purchasing the articles in question for the supply of the British fleet.—Restitution.

*For the Captors, the King's Advocate and Laurence argued,*—that the claimant, Mr. Gregory, appeared to have been the *British* Consul at *Barcelona*, where he resided voluntarily after the breaking out of hostilities between this country and *Spain*, till *February 1797*, when he was forced away by the *Spanish* government: That his house in *Spain* was afterwards reserved for him till 1800: That the wines in question were wines kept in his stores, for want of an opportunity of shipping them off, till at last they were sent with other wines, which had been purchased to mix with them, to *Leghorn*. It was contended, that these circumstances composed a case exactly similar to Mr. *Escott's* case, 1st *Admiralty Report*, p. 203; and that these wines were subject to condemnation, as the property of a *British* subject taken in trade with the enemy.

*On the other side, Sewell said,*—That Mr. Gregory was willing to make an affidavit, that he was not a merchant in *Spain*; that these wines were the surplus of a quantity purchased by him, to supply the *British* fleet in the *Mediterranean*; and that he had not

The  
MADONNA  
DELLE  
GRACIE.

Feb. 10th,  
1802.

not *before* purchased any other wines, or for any other purpose.

It was replied, that he was not a person holding any contract for this purpose with Government; that he was engaged with another person, Mr. ———, who was agent for the *British* fleet, and that he was not to be considered as a commissioner, but as a general merchant.

#### JUDGMENT.

Sir *W. Scott*. — I remain very much of the opinion that I intimated before, when this case was first opened, that the circumstances stated on behalf of Mr. *Gregory*, would, if true, afford a fair ground of distinction between this and the other cases, to which allusion has been made. The circumstance on which I principally form that opinion is, that the claimant had purchased the quantity of wines in question for the sole purpose of supplying the *British* fleet, before the breaking out of hostilities with *Spain*. Mr. *Gregory* had been settled in *Spain*, but in what character, whether as a merchant or not, does not appear from the papers. I now understand that fact can be supplied, and that it can be shewn that he had *not* acted as a merchant, nor made any purchase, but for this particular purpose. Such a situation does, I think, very much distinguish his case from the other cases to which a reference has been made. *They* were cases of persons settled in the enemy's country, and carrying on trade there, on the footing of a general traffic. Mr. *Escott* was a *wine-merchant*, who withdrew *himself*, but not his wines; other wines were bought, and his trade  
went

went on, as in its ordinary and usual course. *This gentleman* purchased only for the purpose of supplying the *British* fleet; he was obliged to retire, and made application to get his wines consigned to the original purpose, but without effect. The wines were then deposited, not like Mr. *Escott's*, in open stores, but secretly, for the use of the claimant, who had retired, and had no communication with his agent, till his brother went to *Spain* at the distance of three years, in a public character, to manage the concerns of the *British* prisoners in that country. This was the first opportunity of giving any directions respecting them; and being the first opportunity, it may be taken, I think, as annihilating the intermediate time, and as bringing the periods together. The interval between Mr. *Gregory's* own personal departure, and the removal of his property, does, I think, under these circumstances, disappear.

His brother, on his arrival in *Spain*, adopts the only mode of getting off his wines, by sending them to *Leghorn*; but finding that they had turned so pale, as not to be saleable, without a mixture of newer wines, some new wine was purchased, and mixed with the old stock, so purchased for the use of Government, and secretly deposited almost as the stores of Government.

Unless this remedy of adding the necessary quantity of new wine could be allowed, to export the other would be of no use; it might as well have been thrown into the river. Such an addition is very distinguishable from any thing that occurred in Mr. *Escott's* case, and must, I think, be considered as not affecting the legality of the transaction.

It

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It is said that Mr. *Gregory* might have obtained a licence. I certainly do not mean to weaken the obligation to obtain licences, for every sort of communication with the enemy's country, in all cases where the measure is practicable; but I think I see great difficulties that might have occurred in applying for a licence, or in using it, in the present case. How could Mr. *Gregory* describe his wines, as to the place from whence they would be exported? They were deposited secretly, and could only be exported by particular opportunities, *quocunque habili modo*. On the other hand, can I entertain a doubt that Government would have been very desirous to protect him in the recovery of this property, purchased under a contract with them? Or, on the ground of public utility, is it too much to hold out this encouragement to persons engaged in contracts of this sort, that they shall obtain every facility in disposing of such stores? It would be a considerable discouragement to persons in such situations, at a distance from home, and employed in the public service, if they were to know, that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a licence; inasmuch, as if a licence had been applied for, it must have been granted. Another circumstance urged against Mr. *Gregory* is, that he had not disposed of his house — perhaps it might not be easy so to do, at the moment of his departure, or afterwards; or perhaps Mr. *Gregory* might entertain some floating expectation  
of

of returning to his official situation ; at all events, it is to be observed, that this was nothing more than his own mansion, and not a house of trade.

On the whole, I do not think that, by restoring this property, I break in upon any one of the principles, which this Court is bound to sustain, as against subjects of this Government trading with the enemy.

Restitution.

The  
MADONNA  
DELLE  
GRACIE.

Feb. 10th,  
1802.

#### THE OSTER RISOER, JURGENSON Master.

Feb. 11th,  
1802.

THIS was a case of a ship carrying sundry articles from *Riga* to *Amsterdam* ; and, amongst the rest, a quantity of sail-cloth, described as linen. The innocent articles belonging to proprietors not implicated in the contraband part of the cargo were restored. The sail-cloth was condemned as contraband, and also some linseed included in the same claim.

Contraband.  
Freight forfeited, Ignorance of the neutral master not allowed.

On the question of freight, it was prayed that the master might be allowed his freight, even of the contraband articles, on a suggestion that he was totally ignorant of the contents of the packages described as linen, and that he was under a special agreement, endorsed on the bill of lading, “ not to open the packages.”

*On the other side, the King's Advocate and Robinson argued* — That the master was *de jure* the agent of the owners in respect to the ship, and capable of binding



The  
OSTER RISSON.

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binding them by his conduct; that if the cargo was pronounced contraband, the privity and connivance of the master must be in law presumed, so as to affect the owners with the forfeiture of freight. That this being the rule of law, the master was not at liberty to bind himself to a voluntary ignorance, by which, if it could be allowed in one instance, the whole penalty of carrying contraband (*a*) might be defeated. A master erring in judgment as to the nature of his cargo, in not considering it as contraband, could not protect the ship from loss of freight, much less could such effect be allowed to a state of *ignorance* of the contents, voluntarily assumed under an agreement, which was itself sufficient to awaken his caution.

#### JUDGMENT.

The Court held, that the master could not be permitted to aver his ignorance; that he was bound, in time of war, to know the contents of his cargo. That if a different rule could be sustained, it might be applied to excuse the carrying of all contraband.

Freight for goods condemned refused — freight for the claims restored, allowed to be a charge upon that part of the cargo — the ship and goods having been separated.

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(*a*) So Mr. Valin, on a collateral subject, respecting the ignorance of the master, "C'est que ce seroit menager au capitaine du navire, une défaite ou excuse, avec laquelle il ne manqueroit jamais d'échapper la confiscation de son navire, et du surplus de sa cargaison. — Aussi M. le Chevalier d'Abreu, parlant des effets de contrabande, remarque qu'il est l'avis commun des auteurs est de rejeter cette excuse." *Tr. des Prises*. ch. 5. sect. 5.

THE CONVENIENTIA, PETERSON Master, and  
two other Ships.

Feb. 13th,  
1802.

THESE were cases of cargoes of corn taken out of an *American* vessel at *St. Andero*, and put on board three vessels, for the account, as it was asserted, of the same proprietor, Mr. *Tanton* of *Altona*. They were taken going on an ostensible destination to *Lisbon*. In the two former cases, the masters confessed that they had secret orders to go into *Corunna*, and that they were actually sailing under an intention of going to that port.

Trade between  
ports of *Spain*.  
—False destination.—Farther  
proof refused.

*In the Convenientia, the King's Advocate argued, on the part of the Captors,—that this being the case of a cargo going a coasting voyage between different ports of Spain, under the additional aggravation of false papers, the Court would in the first instance pronounce it subject to condemnation.*

*For the Claimant, Arnold and Laurence.—It is a dangerous principle to admit, that the master should have the power of sacrificing the property of the cargo, on his oath alone, by averring a false destination. The affidavit of the shipper states the voyage to be to Lisbon, so that there is at most but oath against oath. The master did himself join in that affidavit, and therefore is not worthy of credit, now coming forward to contradict himself. It was farther said, that the coasting trade of Spain had never been prohibited to foreigners; that there being no special illegality affecting the voyage on that ground, it was to be*

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taken as a voyage from the port of one enemy, to the ports of another enemy, in which the rule respecting a false destination, had never been laid down to greater extent, than to affect farther proof.

#### JUDGMENT.

Sir *W. Scott*. — It must be admitted, at least, that this is a case of farther proof, as the master can give no account of the property. That will make it unnecessary to consider the fact as to the coasting trade of *Spain*, whether it stands on a different footing from that of other countries or not (*a*). The only fact in the case which I have to consider is, whether this ship, which is in every respect documented as bound to *Lisbon*, was in reality going to *Corunna*.

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(*a*) In the *Allegoria*, Feb. 13, 1802, a case respecting freight of a neutral ship, taken on a voyage between two *Spanish* ports, *Laurence* took the same objection, and contended, that it was a trade not denied to neutrals in time of peace, by the policy of the *Spanish* laws; that this circumstance had not been adverted to before, in the *Emanuel*, [1 *Adm. Rep.* p. 298.] that it was therefore open to argument in this instance: That the reasoning on which that decision was formed, did not apply to voyages between ports of *Spain*.

*Court*. — I think myself entitled to presume, that the coasting trade of *Spain* is guarded by the same rules, and is placed on the same footing, as the coasting trade of other countries, unless the contrary is distinctly proved. In the present case, nothing is produced to establish the contrary, on which the Court can act; and therefore there is no ground for departing from the rule, which has been applied in other cases.

Freight and expenses refused.

The

The papers all describe the destination to be to *Lisbon*; and there is an affidavit of the shipper, swearing, I observe, not that the ship is actually going to *Lisbon*, but "that he had, by virtue of the royal privilege, &c. shipped a quantity of corn, &c. bound to the port of *Lisbon*, as appears by the charter-party, and the bill of lading." This is not an express averment of the destination. It is imperfect in two respects; even the words "bound to *Lisbon*" might be taken as mere description, and as not containing a direct averment; but the other words which follow, "as appears by the bill of lading," supply an equivocation, which would entirely take off the effect of the former part, if it could be understood to aver a destination to *Lisbon*. The master's concurrence in that affidavit is still less direct, since he swears only, "that *Lisbon* was his true destination, and that he was bound to deliver there, according to his bill of lading." The account which the master gives on the interrogatories is, "that Mr. R—— is the lader; that he does not know the owners; that by the papers, the cargo was to be delivered at *Lisbon*, but that he was told by the broker, who chartered his vessel, that if he went into *Corunna*, he would be paid the same freight; and that he intended to go to *Corunna*."

It is objected, that it would be a dangerous principle to hold the master's evidence conclusive, as to the destination. The Court has never laid down the rule to that extent: It has only said, that unless the testimony of the master is discredited or contradicted, his evidence on this fact must be of great weight. In point of fact, he is the person to whom the secret is entrusted. In point of principle also, he

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is entitled to great attention, inasmuch as he must, in so deposing, bear testimony against his own interests, and those of his employers, which is a circumstance that gives weight, in all ordinary cases, to the credibility of human testimony. It is, however, a possible thing, that a master may, in some instances, be actuated by sinister motives to depose falsely; therefore, the Court has never ventured to lay it down as a fact to be taken, absolutely, in all cases on the bare assertion of the master. It will look to the other circumstances of the case, and see how far the credibility of his evidence is impeached or supported. The Court will estimate the credit of the master by the manner in which he appears to make his deposition. If his evidence appears fair in other respects, and is not confined to a mere dry assertion, but enters into a circumstantial account of the fact, there will be reasonable ground to conclude that his evidence is not corrupt. In both these respects, I think this man's evidence is unimpeached: he has deposed to such circumstances as make it highly credible; and there is nothing in the manner of the transaction to affect his credit. It is said that the directions were given *only by the broker*. But if owners could, by the general directions of third persons, shift off the responsibility, and come and claim as persons entirely unaffected by the management of the transaction, it would be a great opening to fraud. Taking the transaction to have passed in this manner, by the direction of the broker, who is to be considered as the *internuncius*, as the agent of both parties, and as binding his employer, I must hold the owners to be affected by the fraud, and as such not entitled to give farther proof.

In

HIGH COURT OF ADMIRALTY.

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In the second case, the evidence being the same, the same sentence passed.

In the *Adjutor*, all the circumstances were the same, except that the master did not disclose a destination to *Corunna*.

The  
CONVENIEN-  
TIA.

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1802.

*It was argued on the side of the Captors*,—that as the cargo was part of the same purchase; and of the same speculation, the claimant must be precluded by what appeared in other parts of the transaction, *from giving farther proof*.

*On the other side, Arnold and Laurence contended*,—that the probability or improbability of the destination to *Lisbon* in this case, might be a matter for farther proof; but could not be determined by what had transpired in the other cases, however connected, in appearance, in some parts of the transaction. That it was against all rules of evidence to judge one case by another; that there was room enough to suggest frauds that might have been attempted by the shipper without implicating the claimant; but that at all events, it was impossible to decide one case by the evidence of another.

*Court*.—These three cases bear a great similarity undoubtedly—“*facies non omnibus una, nec diversa tamen*.”—They are claimed by the same person, and arise out of the same purchase of the cargo of an *American* vessel, which was not admitted to go into the *Spanish* port, because she had been a *British* prize. They were all contemporary transactions, and conducted by the same parties. In the two former cases, the

masters



The  
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masters admitted the destination to *Lisbon* to be false and colourable: In the present case the master does not; this is the only feature in which they differ; but still I must say, that this circumstance makes a great distinction in a legal point of view. There may be reason, morally, to conjecture, that this cargo had the same destination as the other two; but it is impossible for me to conclude, that because the other ships were going to a different port, than that held out in their papers, that the destination in this case is false also. My suspicion may be very strong; but I think it would be going farther than any rule of law will warrant me, to come to such a conclusion.

Under these considerations, I shall admit this case to farther proof; but very strong proof of property and destination will be expected: After what has passed, it will not be improper to require, that Mr. ———, and also the shipper, should negative the circumstance of any conversation, or verbal order, similar to what appears to have passed in the former cases, and that it should be distinctly averred, *that this master was not sailing* under directions to go to any other port, than what was described to be the ostensible destination.

*May 20th, 1802.*—This cargo was condemned, no farther proof being exhibited.

## THE CARL WALTER, SCHMIDT Master.

Feb. 16th,  
1802.

THIS was a case of a cargo of hides, taken on board a *Danish* vessel, on a voyage from the *Tagus* to *St. Andero*, in *Spain*; having been trans-shipped from on board a *Spanish* ship, which had arrived in the *Tagus* from the *Brazils*, under the protection of a *Portuguese* convoy. The claim was given for a *Mr. Belgear*, a *Prussian* by birth, but residing and carrying on trade at *Lisbon*.

Transfer  
in transitu,  
illegal—proof  
of property.  
Spanish hides  
asserted to have  
been transferred  
to a Portuguese  
merchant in the  
*Tagus*.

*On the part of the Captors, the King's Advocate and Sewell.*—It is a matter of general notoriety, that notwithstanding the war subsisting between *Spain* and *Portugal*, a fleet of *Spanish* vessels from *Buenos Ayres* was suffered to sail under the protection of a *Portuguese* convoy, and actually arrived in the *Tagus*. The hides, now before the Court, were by the account of all the witnesses to the 21st interrogatory, a part of the cargo of one of these ships, trans-shipped in the *Tagus*, four miles down the river, at a port where foreign ships are allowed to enter and unlade goods for re-exportation, without paying any duties. They are claimed for a merchant at *Lisbon*, and falsely described as *Portuguese* hides, and as being the produce of the *Portuguese* settlements in the *Brazils*. Upon the question of property, it is to be observed, that there is a defect of proof, inasmuch as the master cannot verify, or give any account of it. But taking the fact to be, that the hides were really *Spanish* hides, as may be presumed from the description given by all the witnesses, "that they were taken from a *Spanish* ship,"

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TER.

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ship," they will be subject to condemnation, even if neutral property, under the principle of law, by which articles of colonial produce, having never been imported into any neutral country, must be held to be taken in *transitu* between the colonies of the enemy and the mother country. The presumption that these hides are *Spanish*, and not *Portuguese* hides, is still farther corroborated by this consideration, that if they had been the produce of the settlements of *Portugal*, they must have been imported into *Lisbon*, and could not have been exported again in this manner without paying duties. It appears also from affidavits which the captors pray to be received, that the hides were sold at *Plymouth* as *Buenos Ayres* hides; that the difference between the *Spanish* and *Portuguese* hides is very considerable, in respect to the manner of dressing them, and also in respect to their value.

*On the part of the Claimant, Arnold and Laurence.*—There is not sufficient cause shewn, in the original case, for the introduction of such affidavits as are offered by the captors. [The Court being of opinion that they should be received.] It is by no means proved, even by the affidavits now exhibited, that they were *Buenos Ayres* hides; if they were, it is not improbable that they may have passed, in the way of trade, from the *Spanish* settlement, into the *Brazils*, and have become *Portuguese* property. The master says only, "that they were taken from a *Spanish* vessel which had come from the *Brazils*;" but the lading might have been the produce of the *Portuguese* settlement, or it may have happened, if the hides were

were the produce of the *Spanish* settlements, that they might have been imported into the *Brazils*, and have become *Portuguese* property, under a transfer of sale in that part of the world. They seem to have been admitted in *Lisbon*, as *Portuguese* property; they passed under the inspection, and through the hands of the Custom-house of *Lisbon*; whether the duties were paid or not is immaterial, so long as the regulations of the foreign Custom-house have been complied with. As to proof of property, there is the concurrent testimony of all the papers, representing these hides "as going on the account and risk of the shipper;" there are besides letters of the shipper to his consignee, giving him the necessary advice and directions to sell. But if either on this point, or on the fact of *produce*, the Court should entertain a doubt, it will not decide against the claimant on the present evidence. The affidavits that have been admitted stand as *ex parte* evidence, which the Court will at least allow the claimant an opportunity of contradicting. If the proof of property should not appear sufficient without the verification of the master, there is nothing to exclude the claimant from giving farther proof on that point.

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## JUDGMENT.

Sir *W. Scott*.—This is a case of a cargo of hides, claimed as the property of Mr. *Belgeiar*, who is described as a *Prussian* subject, but is actually residing, and carrying on trade at *Lisbon*. The voyage is from *Porto Franco*, in the *Tagus*, to *St. Andero*. The first observation that impresses itself on the notice of the Court, is the answer of the master to the 22d interrogatory,

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CARL WAGNER  
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interrogatory, in which, I do not see that he has spoken in any other manner, than what might be perfectly natural in his answer to that interrogatory, or that he has in any degree digressed from the purport of the question put to him. He says, "that the cargo was all brought on board in lighters; that it was *all*, as he then heard, and was informed; brought from a *Spanish* vessel lying there, which had come, under a *Portuguese* convoy, from the *Brazils*." He says, that he was so informed, and seems to have believed what he heard. The other witnesses concur in giving the same account, though perhaps not quite so strongly. This cargo, so taken on board, was going to a *Spanish* port, but whether to the port of its original destination, or not, does not appear. Now when I am called upon to admit farther proof, on the part of the claimant, I cannot but observe, that there was pretty strong notice conveyed to the claimant in the depositions of the fact, that a *Spanish* fleet had arrived in the *Tagus* about this time; and therefore it might be expected to be shewn, either that these hides *were not Spanish* produce, or, if they were, that they had been fairly and completely converted, and had become the property of the *Portuguese* merchant, by a *bona fide* importation and sale, notwithstanding he might have been imprudent enough to pursue the destination to a *Spanish* port. This observation, on what the claimant *might have done*, is still farther strengthened, from the circumstance that farther evidence is now offered.

Some reflections have been thrown out against a practice, imputed to *British* cruisers, of taking refuge in *Lisbon*, and falling out to make seizure of property shipped

shipped in that port. The circumstances which are disclosed in this case must, I think, prepare us to look on such a consequence, if true, without much indignation or surprize; because, if the government of *Portugal* is reduced to such a wretched dependence on *Spain*, as to lend her convoys, to protect the trade of *Spain* from *British* capture,—to stand forward to protect, in time of war, the commerce of *Spain*, against the cruizers of her own ally, it cannot be much matter of surprize, if the peace of her ports becomes subject to some degree of interruption. What was done in this case does not, however, appear to have interfered in any manner with the rights of neutral ports; since the privateer went out, and made the capture at sea, and no such *habit* is proved upon her.

Affidavits have been brought in to show that the hides, of which this cargo is composed, are *Buenos Ayres* hides, and so I observe, they are described in the return, made by the commissioners of appraisement and sale, one of whom is, according to the regular practice, appointed by the claimant. They all concur in this representation, and say, “that there is only one opinion on the subject.” It is, besides, stated on the authority of two merchants, “that if they had been *Brasil* hides, they must have been imported at *Lisbon*, and not at *Porto Franco*, and in a *Portuguese* bottom.” No duties appear to be charged in any of the papers.

It is therefore by these circumstances fully established to my satisfaction, that there was no such importation into *Lisbon*, as would justify a sale; since it has been repeatedly determined, that in time of war

property

The  
CASE WAL-  
TER.

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TER.

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property cannot be legally transferred and changed in *transitu*. [*Dankebar*, 1 *Adm. Rep.* p. 112.] There is, I think, reason to conclude, that there has been no *bona fide* importation; and if so, the fact of sale would not avail, even if it had actually taken place. The goods would still be liable to be considered in the same light, as if they had been taken in *transitu* on their original destination.

But farther, is there not evidence to satisfy me that the asserted title is a mere shadowy title, and nothing else? Of whom were these hides bought? It is not possible that Mr. *Belgeiar* could have been the proprietor in *Buenos Ayres*, — as such, he would not have been permitted to import. He must have become the purchaser then at *Porto Franco*; and if so, there should have been some document of his title on board. Instead of that, there is no evidence of such purchase; there is nothing but the formal papers, the bill of lading, and a letter of advice, mere dry and *jejune* papers, on which he never could have rested his title to so valuable a cargo; unless he can be supposed to have conducted his affairs, in such a delicate situation, with the most supine negligence.

But there is a document on board, which does, in my opinion, bear as strongly against the truth of the transaction, as any thing can do. There is a certificate introduced, to declare the neutrality of the property, from a person who has no authority in *Lisbon*, but as agent for the exchange of prisoners between *France* and *Portugal*. This person is brought forward to declare, that the goods in question are "*provenants*," from the *Portuguese* possessions in *Brazil*.

The

The terms in which it is expressed in the *French*, are very equivocal. These hides might be "*provenants*" from the possessions of *Portugal*, without establishing in any degree that they are of the produce of *Portugal*. But why an agent of the *French* government should take such pains to protect the property of a *Portuguese* merchant, then an enemy of *France*, is not very intelligible. It cannot be, that this certificate was intended to protect the cargo, as *Portuguese* property, against *French* capture, because the very representation of *Portuguese* property, would but awaken the vigilance and avidity of the *French* cruizers. Against *English* cruizers, such a representation might be expected to afford some protection. This is, in my estimation, by no means an insignificant circumstance to shew, that there was an enemy's interest in this transaction. There is every reason to believe that this has been a fraudulent business from the beginning, if not an *invalid* transaction, in point of law: and I have no hesitation in pronouncing this cargo subject to condemnation.

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CARL WAL-  
TER.

Feb. 16th,  
1802.

In the *Doris*, the Counsel not being able to distinguish, Judgment the same.

In the *Potrimpos*, documented from *Lisbon* to *Emden*, the *King's Advocate* said, there were 2000 hides of the same quality, being the produce of *Buenos Ayres*, claimed by Mr. ———, of *Emden*, in which the sentence must be the same. That there were, however, 10,000 other hides, described as *Brazil* hides, on which farther proof must be given, the master not being able to verify.

For



## CASES DETERMINED IN THE

The  
CARL WAL-  
TER.

Feb. 18th,  
1802.

*For the Claimant, Arnold prayed,*—that farther proof might be admitted of the whole parcel; observing, that in this case, the duties were charged, and described to have been paid; and that there was nothing conclusive to shew that they were *Buenos Ayres hides*.

*The King's Advocate replied,*—that as to the 2000 *Buenos Ayres hides*, it was still a sale in *transitu*, like the preceding cases.

*Court.*—It is not quite so. If they were going actually to *Emden*, there had been a termination of the original voyage. I will see the proof applying to the whole.

21<sup>st</sup> May 1802. — This claim was heard on farther proof, when the Court, being of opinion that the proof was insufficient, rejected the claim.

Condemned.

Feb. 23d,  
1802.

## THE WILLIAM, STODART Master.

Monition against captors to proceed to adjudication.—Protest, that there was no claim before the Court, and 2dly, that this was a proceeding under the Dutch hostilities, and that the captors had no letter of marque against the Dutch, overruled.

THIS was a case in which a monition had been taken out against the captors to proceed to adjudication. The captors appeared under protest, objecting that no claim had been given, and that it was not competent to the parties to call on the captors, to proceed to adjudication before they themselves were in the character of claimants before the Court.

*The Registrar said*,— that something had been done very irregularly in this proceeding, though it did not appear how it had arisen; that it was not the practice to issue a monition to proceed to adjudication, till a claim had been given, and security entered. That the present monition described the claim, “*to have been given*,” though it was now insisted by the captors, that there was no claim.

The  
WILLIAM.

Feb. 26d.  
1802.

*Court.*—The monition that has issued against the captors, “is to proceed to adjudication:” They object, that no claim has been given by the parties, applying for the process of the Court. Undoubtedly, it is the usual practice for a party to give in his claim, in the first instance; but it will not necessarily vitiate the process, if there has been no claim. If it should, in any manner, come to the knowledge of the Court, that a seizure had been made in the nature of prize, and that no proceedings had been instituted, it would be the duty of the Court to direct proceedings to be commenced. In common condemnations, it is not necessary to wait for a claim. The captors, in this instance, admit all that is necessary to found the process of the Court, by the seizure and forcible possession; that is sufficient to oblige them to proceed to adjudication. Another ground that has been taken, is, “that the captor is not liable to be called upon to proceed to adjudication; because he is not commissioned against the *Dutch*, and that the cargo was sent over here by the Court of *Bermuda*, under a suspicion that it was *Dutch* property, and on bail to answer all questions.” The captor had taken out a commission against the *French*, at least; and *non constat*, that this cargo might not be *French* property. The Judge of the Court of *Bermuda*

The  
WILLIAM.

Feb. 23d.  
1802.

*muda* has determined nothing on that question, but rather remitted the cause, declining to decide upon it; but, if the captor had taken out *no* commission, is he to be at liberty to make a seizure, without being responsible to the neutral merchant, because *he* is *non-commissioned*, and cannot obtain condemnation to himself? I have no hesitation in overruling the protest, and with costs.

Captors directed to proceed to adjudication.

Feb. 26th,  
1802.

#### THE JOHN AND JANE, ASKEW Master.

Dereliction of a prize ship by the enemy, not considered as a dereliction imputable to the proprietor.—  
1-6th given.

THIS was a case of an *English* ship found at sea, having been taken by the enemy, and deserted by the captors.

*Laurence* argued, — that the Court would consider it as a case of derelict, and give a moiety, especially as the value was very small.

*Court.* — I do not think that this is to be taken as a case of derelict. The vessel appears to have been captured by the *French*, and deserted; but there is no *animus derelinquendi* imputable to the owner. The *French* captors had left the vessel, because, perhaps, they did not wish to be incumbered with her, or delayed in their cruise. But those who were in possession, as the agents of the proprietor, had not committed any act of dereliction. The principle of derelict does not, in my opinion, apply. If the enemy

enemy had kept possession, and maintained a contest, the law would have given only one-sixth to a recaptor (a). Can it be said that the merit of the salvors is greater, or that they are entitled to a greater reward, because no person was left on board the ship to defend her? The value is stated to be not more than 600*l.* I shall give 150*l.* though perhaps that will be going farther than may, on strict principle, be warranted.

The  
JOHN and JANE.

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1802.

(a) There is one species of recapture from the enemy which vests the whole interest in the recapture, viz. where an enemy's ship, taken originally by one *English* vessel, and lost again to an enemy's cruiser, is subsequently recaptured by another *English* ship. It has occasionally become a subject of discussion in the Prize Court of this country, and also in *France*, whether any interest reverted in the first seizer; and in 1778, in the case of the *Lucretia*, the Court of Admiralty was disposed, though apparently in departure from more ancient precedents, to consider the first taker as the captor, and the subsequent taker as the recaptor, entitled to a high salvage. It does not appear, that this case was appealed. But in another instance the same point was much contested before the Lords of Appeal, in the case of the *Polly* (a), in which the prize had been rescued by the *American* crew, and retaken, and condemned to the last captor in the Vice Ad. Ct. of *New York*.—On appeal, brought by the first seizer, the Lords affirmed the sentence of the Court below, holding, that the original captor had not completed his possession; that the incipient interest which had been acquired by the first taker, was entirely divested by the subsequent rescue, and that the final *British* captor was to be considered as the efficient captor, and as such entitled to the whole benefit of the prize. In the case of the *Marguerite* (b), the same question was brought before the Court of Appeal, with the only difference, that the first recapture had been made by a *French* frigate. The Lords pronounced a decree to the same effect, and condemned the appellant in costs. Mr. *Valin*, *Traité des Prises*, c. 6. § 1. says, that this point was established in the *French* Court of prize in favor of the ultimate captor, by an arrêt, A.D. 1748.

(a) Lords,  
21st Nov. 1780.

(b) 3d April,  
1781.

March 16th,  
1802.

### THE AURORA, LINDBERG Master.

Proprietary  
interest, still  
residing with  
enemy—Shipper,  
under the  
circumstances,  
condemnation.

THIS was a case respecting the legal proprietary interest in certain goods, shipped in a *Spanish* port, and sent to *Ireland*. The principal facts were stated to be, that *Neale*, a merchant, living in *America*, having been engaged in exporting barilla from *Teneriffe* to *Ireland*, and having funds in *Teneriffe*, was considerably in debt to *Cunningham*, his correspondent living in *Belfast*; that *Cunningham*, wishing to get the debt liquidated, sent over his clerk to *Cullen* and ———, merchants, at *Teneriffe*, to persuade them to ship a farther certain quantity of barilla consigned to him, but *on the account of Neale*, as they had formerly done, on a promise, that he would be responsible for the remainder of the shipment; a licence was obtained for such importation, and a vessel chartered and sent out to bring the goods to *Ireland*. The clerk arrived, and the transaction went on according to *Cunningham's* directions; the shipment was made, and the bill of lading signed to *Neale*, when the shippers received advice from *London* of the real nature of the order, that it was not in the common course of a consignment to *Cunningham* for *Neale's* use; but that *Cunningham* had taken this method to indemnify himself, by getting the property of *Neale* into his hands. On this discovery, the shippers, who had made out a bill of lading to *Neale*, interposed, and refused to let the ship sail, unless *Jameson*, the clerk of *Cunningham*, would consent to an alteration of the bills of lading, and take them “ to the order  
of

of the shippers;" the bills of lading were accordingly made out in that form, and the ship sailed and was captured.

The  
AURORA.  
March 16th,  
1802.

*In support of the Claim, Laurence and Sewell contended, — that the ship having been chartered by Cunningham, and sent out on this expedition, a delivery to the master was a delivery to him.*

*Court. — Was there not a case very lately of goods sent by a merchant in Holland to A. a person in America, by order of B. and for account of B. but with directions to A. not to deliver them, unless satisfaction could be given for the payment, — in which case the property was held, not to be divested out of the Dutch shipper, and condemned?*

*Laurence. — Such a case has occurred, but there the goods were not going to the hands of the purchaser, but to a third person who might be supposed to keep up the possession of the shipper, as an intermediate agent: here they are going directly to the consignee, and into his possession.*

## JUDGMENT.

*Sir W. Scott. — This is the case of goods shipped in Teneriffe, and bound to Belfast, there to be imported, it is said, under a licence, though all that is produced is not a licence, but an order of the Lord Lieutenant to the Custom-house, reciting, " that there was such a licence." It is proper, in all cases, that the licence itself should be exhibited, in order that the Court may see whether the party has com-*

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plied with the terms of it (a). One limitation of the licence I can infer from what is here stated, viz. that the articles were to be either *British* or *Irish* property; if they should prove not to be the property of a *British* or *Irish* merchant, it would be impossible that they could be restored under this licence. A second condition is, that they were to be imported by Mr. *Cunningham*. If the Court should be of opinion, that these two conditions have NOT been complied with, the licence itself will be of no avail. Although the Sovereign, and those who represent him, may have the power of permitting even the importation of enemy's property, and that by any person whatever, I am not to presume such an intention, in either member of it, unless the terms of the licence expressly so declare it.

Then how can it be said, that Mr. *Cunningham* is the importer in this case? I do not see how he can be so described: he charters a vessel, and sends her to the Isle of *Teneriffe*, to bring from thence a cargo, for the account of *Neale*, a merchant in *America*. The vessel arrives at *Teneriffe*, where there was an agent of Mr. *Cunningham*, who appears, with the assistance of C——, a merchant of the island, to have transacted the business with *Cullen* and Co. of

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(a) The concluding clause of licences provides, "That any person who shall claim the benefit of the licence hereby granted, shall take and have the same, upon condition, that if any question arises in any of our Courts of Admiralty, or elsewhere, whether such person or persons hath or have, in all points conformed thereto; in all cases whatsoever, proof shall be on the person or persons using this our licence, or claiming the benefit thereof."

Seville.

*Seville.* The charter-party was in the course of being fulfilled, and a cargo had been put on board, consigned to *Cunningham*, but on account and risk nominally of *Mr. Neale*. The whole of this transfer was afterwards rescinded. The shippers take alarm, and wish to give a different shape to the business. They consent to let the cargo go to *Belfast*, but not to the hands of *Cunningham*, in the first instance, nor for the account of *Neale*. It is described to be going "for their order," and consigned to the house of *Cotter Bolland and Co.* in *London*, who were to suffer it to go on to *Cunningham*, if they were satisfied for the payment. By these means the shippers calculated to protect themselves against danger of two kinds. They were not personally acquainted with *Cunningham*: they hoped therefore to guarantee themselves against any risk from that quarter, and also against the insolvency of *Neale*. In doing so, they have, unfortunately for themselves, incurred another danger which they did not foresee, viz. that of rendering this property liable to condemnation, as property still vested in them, subjects of a State in hostility with this country. The shippers, having the goods in their power, and in their own port, refuse to let them go, unless under an alteration of the bill of lading. — It is said that *Cunningham's* agent consented that they should be so shipped; I do not exactly see how that can vary the case; if it was a voluntary offer on the part of the agent, that would not alter it; but it rather seems, that it was not voluntary, but forced upon him, under the power which the shippers retained over the goods. It is true, the vessel was coming to *Belfast*; but are the goods consigned to *Mr. Cunningham*?

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*ningham?* By no means — he has no legal connection whatever with them, he had no document by which he could demand possession, or describe himself as the legal importer. He might perhaps consider himself to be the importer, but the question is, whether he can, in law, be so considered. Suppose the ship had arrived, and that Mr. *Cunningham* had, in the mean time, been involved in difficulties, would not *Bolland* and *Cowper* have stopped these goods? In what way could Mr. *Cunningham* have demanded them? They would have been still the goods of *Cullen*, and in his own possession, for the possession of *Bolland* and Co. *his agents*, would be considered as his own. If I send money to a banker, my banker's possession is *my* possession. To say, that *Bolland* and Co. are *also* the agents and correspondents of *Cunningham*, makes no difference, because the goods were not sent to them in that capacity. They were the correspondents of both parties; but they were to act *in this* instance for the security of the shippers. It is impossible to distinguish this case from other cases, in which the goods being still under the dominion of the shipper, and subject to his order, the property has been held in this Court not to be legally changed. I cannot but be of opinion, that this cargo continued still the property of the shippers, that Mr. *Cunningham* would not be legally answerable for the payment, and that in condemning these goods, I condemn nothing but what is to be legally considered as *Spanish* property.

## THE TRELAWNEY, LAKE Master.

March 19th,  
1802.

(Instance Court.)

THIS was a case of salvage, on behalf of the *Lord Nelson* slave-ship, for the recovery of the *Trelawney*, another slave-ship, on the coast of *Africa*, from some insurgent slaves, who had dispossessed the master and crew, and sent them on shore.

Salvage of a new species.—  
Rescue of a slave-ship from insurgent slaves, on the coast of Africa, by another slave-ship.—  
1-10th given.

*On the part of the owners of the Trelawney, against whom the monition had been granted* [vide 3 Adm. Repts. p. 216.] *Arnold stated*,—that the representation, which was now before the Court, was an *ex parte* representation only. That the master of the *Trelawney* was dead, and the rest of the crew had not been in *England* lately, so as to enable the owner to offer any thing in the way of evidence, in opposition to that account. That, in respect to the value of the property saved, it was to be recollected, that the service was rendered on the coast, and therefore the value of the slaves recovered, was to be estimated by their price in that country, and not by their ultimate value (a) in the *West Indies*, after the contingencies of a long voyage. It was farther contended, that no precedent could be produced in which salvage had ever been demanded for such services;—as the occasion could not but be frequently occurring, it was to

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(a) Stated to be about 10,000l. on the arrival at *Jamaica*, or *England*.

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be inferred from hence, that between persons engaged in this trade, it was considered as an act of mutual assistance, to be afforded, and received gratuitously, without founding a demand of legal salvage against the owners.

#### JUDGMENT.

Sir *W. Scott*. — The first question that I have to consider, is, how far the fact, on which the claim of salvage is built, is sufficiently established. It stands on what is called the *ex parte* representation of the salvors, in which they have taken on themselves to describe the circumstances of the transaction. If that stood alone, it would undoubtedly be considered with great jealousy by the Court, but it is accompanied by this corroborating circumstance, that the other party has opposed nothing to it. It is not denied that the master and crew have been in *England* since the transaction. Their representation, if it contained an account, in any respect, substantially different from that which has been given by the salvors, would have been received, and might have been very important. But nothing of that kind is offered: neither is it suggested, that the owners have received any other representation than that which is now given by the salvors. To come at this late hour, and call it an *ex parte* representation, when nothing is offered or suggested, as capable of being produced in fair contradiction to it, is a little unreasonable. I must, I think, look upon it as more than an *ex parte* representation, and consider the fact to be as much established, as if it had been made out by plea and proof. The result of that opinion must be, that  
the

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the fact is sufficiently before me, and that it is likewise a meritorious service, as there represented.

The  
TRELAWNEY.

March 19th,  
1808.

The affidavit of Mr. *Kendal*, the master of the *Lord Nelson*, states, — “ That he arrived at *Cabenda*,  
“ on the coast of *Angola*, in *May* 1799; that during  
“ his stay there, the *Trelawney* arrived, and was  
“ employed in taking in her complement of slaves,  
“ when, on the 2d of *August*, about six o’clock in  
“ the morning, those already on board, in number  
“ about 85, rose upon the captain and crew, seized  
“ the arms, wounded two of the crew, and got com-  
“ plete possession of the ship in about five minutes;  
“ that the captain and all the crew, except the two  
“ men who were wounded, got through the cabin  
“ windows into two boats, belonging to the *Trelawney*,  
“ and rowed away to the *Lord Nelson*.” — So that there  
was a complete abandonment: I impute no blame to  
any one on this account; but I mention it, as shew-  
ing that the crew were completely overpowered, and  
obliged to quit the ship. — The affidavit farther states,  
“ That this deponent, conceiving that not a moment  
“ was to be lost, commenced a heavy fire from his  
“ great guns and small arms, into the *Trelawney*,  
“ which was lying about half a cable’s length from  
“ the *Lord Nelson*. That the captain and surgeon of  
“ the *Trelawney*, and a boy, got on board his ship,  
“ but he prevented the rest of the crew from quitting  
“ their boats. That about this time, thirty of this  
“ appearer’s men, whom he had previously dispatched  
“ in two of his boats for that purpose, had boarded  
“ the *Trelawney*, and were engaged with the negroes  
“ about an hour and a half, and after a severe con-  
“ flict, in which two of his crew were severely  
“ wounded,

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TRELAWNEY.  
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“wounded, succeeded in quelling the insurrection.  
“That about a quarter of an hour before the slaves  
“were completely subdued, this appearer went on  
“board the *Trelawney* with the boat’s crew, whom  
“he compelled to return, by threatening to fire  
“into their boat; that he remained on board the  
“*Trelawney* till between nine and ten o’clock, when  
“perfect order was restored, and this appearer re-  
“turned to his ship, leaving his surgeon and sur-  
“geon’s mate to take care of the ship and give the  
“necessary relief to the wounded;” and lastly,  
“that if it had not been for his exertions, and the  
“spirited conduct of his ship’s company, the said  
“ship *Trelawney* and her cargo must have been  
“inevitably lost.”—So that every part of the service  
was meritoriously performed. He compelled the  
crew of the *Trelawney* to do their duty, he afforded  
assistance, and finally succeeded in quelling the mu-  
tiny, and recovered possession of the ship, and *this*,  
not without a conflict with very desperate persons.  
It must be admitted, on this view of the facts, that a  
very great benefit has been received.—By whom? by  
the owners of the ship and cargo. As far as the sal-  
vors are concerned, they have no privity with the  
(a) insurers. Their demand is against the owners alone,  
though in fact, the insurers may be in general the persons  
on whom the loss, if that is a loss by which, on the  
whole, they are benefitted, ultimately falls. It is to  
the owners of the property rescued, that the salvors are  
to look for their reward. If it be in point of fact  
true, as stated in the act, that the salvors did make a

filly

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(a) It had been stated in the affidavit of the owner of the *Trelawney*, “that he would be prejudiced by the delay of the cause, owing

filly declaration, that they would take nothing from the owners, that is a declaration not to be pressed upon the Court, as affording any legal ground of exception against this suit. It is the duty of the Court, in this, as in many other instances, to protect persons against their own indiscretions.

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It appears that some negotiation had been going on to settle this matter by agreement with the underwriters ; but they are a numerous body, and I am not surprised that no final settlement has been concluded. Laying out of the case all imputation that one party may be disposed to throw upon the other, I have nothing to do but to consider the value of the property that has been saved, and the service performed : It is, as I have said before, upon the credit of the representation given, a meritorious service, to be considered as a rescue effected from pirates ; and to say the least of it, full *as meritorious as* recovering property out of the hands of the public enemy. If the case rested here, I should be disposed to accede to the prayer which has been made, that the court would give salvage, in as high a proportion, as is directed by the Prize Act, for cases of recapture of war. But I ought to remember, at the same time, the nature of the trade in which these two ships were employed—that it is a service of common danger, on which every vessel probably goes out under an

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owing to the insolvency of several of the underwriters, of whom he should not now be able to recover the amount of the salvage, if any should be decreed ; and farther, that the owner of the *Lord Nelson* had declared to him, that he did not wish to receive salvage at the expence of the owner, if not insured ; but that if the underwriters would have to pay it, he expected only so much as might be recovered from them, and no more, or to that effect."

impression

The  
TREASURER.

March 19th,  
1802.

impression of the policy and duty of rendering mutual assistance. When vessels are associated in some degree in a common interest, they do not stand so independent of each other, as ships falling only accidentally into the way of rendering such assistance. This being the first case of the kind, it may, perhaps, not improperly lead to the establishment of some such principle as, I have said, may reasonably distinguish cases of an associated interest, from ordinary cases, in which a privateer, or other vessel, has no particular connection with the ship rescued.

That being the case; I shall, upon consideration of all the circumstances, pronounce one tenth of the value of the ship and cargo, and freight, (after the *salvors* expences have been first defrayed) to be due as salvage.

Value about 10,000l.

March 19th,  
1802.

#### THE HERMAN, SCHROEDER Master.

National character.—A merchant of Embden, having also a share in a house in London, is not precluded by that circumstance from averring an entire interest in his house at Embden, in a shipment from the enemy's country consigned to the house in London. Reiteration.

THIS was a case on the national character of Mr. Rudolf, in respect to the effect which that circumstance would have on the legality of the trade: it being a trade from the *enemy's country* to *London*, for the account and risk of Mr. Rudolf.

For the Captors, Laurence contended,—that Mr. Rudolf was to be considered as a *British* merchant; that he had been a partner in a house of trade in *London*, and had been personally resident in *London* till 1796; that he still remained a partner in a house at

# HIGH COURT OF ADMIRALTY.

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at *London*, to which this cargo was consigned, and was himself in *London* at the time of shipment, and made his claim in this Court in his own person; that it was not even stated that the shipment was made under orders transmitted from the house at *Emden*; that if this distinction of character could be allowed; there would be no means of preventing *British* merchants from trading with the enemy.

The  
Hear man.

Diff. rub. 17th  
and 20th,  
1800.

On the other side, *Robinson*, referring to the affidavit in which the circumstances of *Mr. Rudolf's* history were set forth, contended, — that he was to be taken as a merchant of *Emden*, where he had a domicile, where his wife resided, and where he was clothed with the character of *British Consul*. It was only for the purpose of soliciting that appointment, that he happened to be in *England* when the claim was given in. He was by birth a *German*, and had been resident for a time in *London*, but had since retired to his native country: He had since that time been considered by Government as a foreign merchant, in the commission under which he had been employed to supply provisions for the *British* army in *Holland*. He had a house of trade at *Emden*, and positively made oath, that this shipment was made solely on the account of that house, and that the house in *London* had no share or connection in it: For various importations which had been made on the account of the *London* house, during the war that house had been in the habit of obtaining the King's licence, which would not have been omitted in this case, if it was not a *bona fide* transaction on the part of *Mr. Rudolf* only as a neutral merchant. With respect to the danger



The  
MERMAY.

March 19th  
and 24th,  
1802.

danger of affording a cover to *British* merchants, to trade with the enemy, *that* was to be guarded against, not by refusing the distinction of character altogether, but by the proof that should be required of its fairness and reality in each particular case: It was allowed to neutral merchants having houses of trade in *the enemy's country*, to separate such concerns from those of their neutral domicile, as in Mr. *Oßermeyer's* cases [3 *Adm. Rep.* p. 41 and 109]: To refuse the same distinction in respect to connections with *British* merchants, would be to discourage foreigners from making a connection with us.

#### JUDGMENT.

Sir *W. Scott*.—This is a case respecting national character, which, I have had repeated occasion to observe, turns frequently on very minute considerations. In the present case I am disposed to think the circumstances stated in this affidavit compose a fair claim, and that the balance preponderates in favour of the claimant. The affidavit states, “ That he was born  
“ in the Electorate of *Hanover*; that from 1795 he  
“ had carried on trade in *London*, under the firm of  
“ *Rudolf* and *Dutton*, which partnership was dissolved in 1798, when his house took the firm of  
“ *Rudolf* and Co. and consists only of this appearer  
“ and *H. Living*; that in 1796 he, with his wife  
“ and family, left *London*, and removed to *Embsen*,  
“ where he was admitted a burgher, and has resided  
“ ever since that time, a few voyages to *England* on  
“ business excepted; that he carries on trade in this  
“ place for his separate account, and that his house  
“ in *London* has not the least interest in the house of  
“ trade

“ trade in this place : That in *May*, 1801, he caused  
 “ 3000 cheefes to be laden on board this ship at  
 “ *Amsterdam* for his own separate account, consigned  
 “ to his house at *London*, without the same having  
 “ any interest therein.”

The  
 HERMAN,  
 March 19th  
 and 24th,  
 1802.

According to this description, his personal domicil is at *Embden*, where he resides, and has a house of trade ; he is only connected with this country by his partnership in a house here, which is to be taken, in a manner, as collateral and secondary to his house at *Embden* : That he may carry on trade with the enemy, from his house at *Embden* cannot be denied, provided it does not originate from his house at *London*, nor vest an interest in that house.

The case is reduced therefore to a question of fact. — It is expressly sworn, that this shipment was on account of the house at *Embden* ; but it is said, that he himself was in *London* at the time of shipment — That fact does not appear ; it appears only that he happened to be here at the time when the claim was given in, and then only for a special purpose, pointing strongly to a permanent residence in *Embden*. If it had appeared, I cannot think that a person being in *London*, on such an occasional errand, and giving orders during his stay here for a shipment in the enemy's country, on account of his house at *Embden*, would on that account bring his property into jeopardy, or render it liable to be considered as *British* property, engaged in trade with the enemy. It is sworn, that his house in *London* had been in the habit of obtaining licences when that house was interested ; from which it may, I think, be fairly inferred, that he considered this transaction entered into without any such

The  
Prisoner.

March 19th  
and 24th,  
1802.

Such protection to be made on account of his *Embden* house only.

On these grounds I am disposed to think that he is not excluded from receiving restitution.

Restored.

March 25th,  
1802.

THE DREE GEBROEDERS, VANDYK Master.

National character of Mr Grant, an asserted American merchant, in France at the time of shipment, and sending cargoes from France to Lisbon. Condemnation.

THIS was a case respecting the national character of Mr. *H. Grant*, claiming as a merchant of *America*.

#### JUDGMENT.

Sir *W. Scott*. — The chief question in this case turns upon the national character of Mr. *H. Grant*; a question which has been discussed in two former cases. In those the Court decreed restitution, and if the circumstances of the present case were similar to those, the same decree would certainly follow; although I may here observe that the consideration of those former cases was tempered with as much indulgence, and liberal construction of the situation in which Mr. *Grant* appeared, even then, as the rules and purposes of justice would admit. If there are, in the present transaction, circumstances which materially vary the aspect of Mr. *Grant*'s character from what it bore on the description then given, the Court will not be very much affected by the authority of those cases.

Mr. *Grant* appears to have been a native of *Great Britain*, but settled in *America*, where he resided and carried on an extensive trade till the year 1798, when he came to *Europe*, — to *England* and *France*,

to look after his debts, and to reclaim some property, captured by the *French*, and also with an intention of carrying back with him his wife and family, who had been residing in *England* for the education of his children. His affidavit states, "That he was requested by the President of the United States to take the command of an armed ship against the *French*; but on declining that offer, he was persuaded to accept the office of Consul General for *Scotland*." In this capacity he says, "he has not acted farther than to appoint deputies." Whether there are any deputies now acting under his appointment, does not appear. If so, it would be a strong circumstance to affect him with a *British* residence, as long as there are persons acting in an official station here, and deriving their authority from him.

Owing to the seizure which the *French* made of all *American* vessels, it seems, his wife did not chuse to venture on her return to *America*. Mr. *Grant*, therefore, took a house for her in this country, and went himself to *France*, in *February* 1800, for the purpose of recovering payment of some debts. He continued in *France* from *February* till *July*, and having succeeded in the recovery of some part of his money, which he had no opportunity of remitting directly, he invested it in the purchase of several prize vessels, which he sent to *England*, some in ballast, and others loaded with provisions. Two of the latter description were captured, and brought to adjudication in this Court, and restored. But a circumstance materially distinguishing those cases from the present, is, that in them he was stated to have entered into that transaction, merely for the purpose of withdrawing his

The  
DREE  
GEBOORDERS.

March 25th,  
1802.

THE  
DREE  
GEBROEDERS.  
March 25th,  
1802.

funds, and bringing them hither to collect his property, and carry it home to *America*. Such pretences are at all times to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this description are entitled to be treated with some indulgence.—Is this such a case? Is this a case of a neutral merchant sending property to *England*, where he meant to be personally resident for some time? What are the circumstances of it? He appears to have gone again to *France* in the following year to collect outstanding debts. Part of the money which he received was invested in a speculation of sending this cargo of butter to *Lisbon*, “because that port afforded a favourable market.” What is this but a voluntary mercantile speculation in the enemy’s trade? It is not the case of a man withdrawing his property to *England*, but engaging in new speculations, and standing on the same footing as any other merchant in the country of the enemy.

If the national character of Mr. *Grant* stood perfectly clear, this circumstance alone would distinguish the present case, and take it out of the *range* of those considerations, which produced restitution of this gentleman’s property in two former cases. But that is not all—It appeared before, that he had very much narrowed his connection with the commerce of *America*, having ceased to act as a general merchant there, and having confined himself to the shipment of the produce of his own landed estate. The Court did *then* feel

feel some difficulty in considering a person in this situation *as a merchant of America*; because a person confining himself to the shipment of the produce of his own estate, does not stand exactly on the same footing as a general merchant retaining a mercantile domicile by his house of trade.

The  
Duke  
GROVEDERS.  
March 25th,  
1802.

It now appears that Mr. *Grant* has disposed of his house, and has nothing left in *America* but his landed estate, which alone has never been held sufficient to constitute domicile, or fix the national character of the possessor, who is not personally resident upon it; except with regard to property which is going as the immediate produce of that landed estate. Mr. *Grant* does not even seem to have formed any definite intention of returning to *America*. He does indeed say, "that he has ordered a house to be built;" but when? Only, "when the materials for building shall return to their usual price." Who can say when that may be? Under this view of the circumstances in which Mr. *Grant* appears in this case, his mercantile connection with *America*, if any, is held by a mere thread: This is a transaction not originating in any purpose of remitting his funds to *England*, and from thence to *America*, but in an independent mercantile speculation, from *Cherbourg* to *Seville*, or *Lisbon*. It is, I think, not entitled to be considered in an *American* character.

It will be unnecessary for me to say whether Mr. *Grant's* character is that of a *French* or a *British* merchant; it is sufficient to pronounce, that he does not stand in the character of a neutral *American* merchant, and that he is not entitled to restitution.

March 26th,  
1802.

THE THERESA BONITA, DE JONG Master.

*A. B. having purchased a cargo of the Confignee free of all expences, and having obtained possession under an order of the Court, made respecting the ship under embargo.—The demand of freight, on the part of the master, against the purchaser not sustained.*

THIS was a case respecting the liability of Mr. *Joseph Wolff* to pay the freight of the cargo which had been delivered to him by decree of the Court, 20th *January*, on bail, “to abide such farther order as should be made by the Court respecting the said goods.”

*On the part of the Defendant, appearing under protest, Swabey.*—The ship, on whose behalf the demand of freight is made against Mr. *Wolff*, is a *Danish* vessel, which had arrived in the port of *London* the day before the *Danish* embargo (*a*) was imposed, having brought a cargo of fruit from a *Spanish* port, imported by the order of *Burnet* and Co. and consigned to them. The cargo had been sold by *Burnet* to *Wolff* the 28th of *June* 1800, under a contract to import two cargoes of nuts, and sell them to Mr. *Wolff*. Owing to the embargo, this cargo could not be delivered without application to this Court. In consequence of an intimation made to Government, that there were several cargoes detained in the River under this embargo, which belonged to *British* merchants, an order of Council issued the 28th of *January*, directing the delivery of such goods as were *British* property, and were coming under a licence to be made *without* bail; and farther, that in the case of neutral

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(*a*) Embargo imposed by proclamation, 14th *January* 1801.

property,

property, or *British* property not under a licence, the delivery should take place *on bail*, "to abide adjudication in this Court, if any proceedings should be commenced against the cargo within two months." On the same day another order of Council issued, which forbade the payment of any bill to persons whose property was under embargo, and also the payment of freight for merchandize imported in the embargoed vessels. On the arrival of this ship she became subject to these orders, so far as to be incapable of receiving her freight. The freight was liable to remain due indeed from some person, that is, from Messrs. *Burnet* and Co. the consignees, when it could be paid; but in no manner could it be demanded from Mr. *Wolff*. He had under his contract with *Burnet* included all charges and freight, and had actually paid them in the price agreed on. But now because *Burnet* has become insolvent, it is attempted to resort to another quarter, and enforce the payment of freight against Mr. *Wolff*, who, if the demand can be sustained, will lie under a manifest hardship in being compelled to pay freight twice. Under one of the provisions made by Government to secure the payment of freight to the embargoed ships, it was directed that the freight might be paid to the Marshal, and that no goods should henceforth be delivered without the payment of freight. The person interested in this freight might, therefore, have applied to the Marshal to receive it. If that step had been taken, Mr. *Burnet* was then solvent, and might have satisfied the demand; instead of that, no such application was made at that time on the Marshal, nor any demand on Mr. *Wolff*. Mr.

The  
THRESA  
BONITA.

March 26th,  
1802.



The  
TERESA  
BONITA.

March 26th,  
1802.

*Burnet* actually paid a part of the freight to the master, by which it is evident that he was the person to whom credit was given for the whole. The master considers *Burnet* as responsible, and actually received 60*l.* from him on account. In the Courts of Common Law (*a*), it is laid down by Lord *Kenyon*, that in cases of goods consigned to A. B. the *consignee* is the person liable to the freight, but not an ulterior person, to whom he may have transferred the property by sale. This is precisely such a case. Under these circumstances, the Court will not put such a construction on the bail which has been given 'to answer adjudication,' as to make it liable to this demand. The condition of answering adjudication meant only as to the question of property, in case any doubt should be raised on that point, but with no reference to such a collateral demand as this.

*On the other side, Arnold.* — The freight was earned in this case before the embargo was imposed. The demand of the master was originally against the consignee; but this was frustrated by the embargo, and also by the interference of Mr. *Wolff*, who applied to the Court for delivery, and swore that the goods were his property. By that act he took on himself the character and duty of a consignee, and virtually pledged himself for the payment of freight. By these means the master was deprived of his security for the freight; he was entitled to have retained possession till some legal authority interposed; by the application of Mr. *Wolff* to this Court, the master was put out of

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(a) *Espinasse's Cases at Nisi Prius, Artaxa v. Smallpiece*—  
Vol. I. p. 23.

possession,

possession, and therefore it is but reasonable that he should be indemnified by Mr. *Wolff*.

The  
THERESA  
DONITA.

March 26th,  
1802.

[It was here stated by *Swabey*, that the cargo was of a perishable nature, and unable to wait till an order of Government could be obtained, and therefore that Mr. *Wolff* applied to this Court, and obtained an order for the delivery on bail, and under a recognizance entered into by *Matthew Edes* and *Joseph Dickins*, to abide such farther order as should be made by the Court, and to bring in an account of sales if required.]

*Arnold in continuation.*—The first order of Council, 28th of *January*, applied only to the detention of the property on board the embargoed ship; at that time this bond was given, and it was framed so general, I apprehend, for the purpose of keeping all questions open. Then came a second order (*a*), referring only to cases under adjudication, and not meaning to apply in any manner to the question of freight, which is proved by the additional order, which issued the same day, providing specifically for questions of freight. In the mean time no freight could be demanded or paid, although it was by no means intended that the freight should be lost. No laches are imputable to the master for not applying earlier; whilst the embargo continued, which was till the 5th of *June*, he was not at liberty to receive his freight; as soon as that detention was taken off, he did apply within a very few days, and although Mr. *Wolff* has stated in his affidavit, that no

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(a) The 17th *March* 1801.

THE  
THERESA  
BONITA.

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1802.

application was made to him till the middle of *June*, it is not inconsistent with the representation given by the master; for if the embargo lasted till the 5th of *June*, a few days might be necessary to consider the steps that were to be taken — No laches are imputable to him; he was originally dispossessed by the act of Mr. *Wolff*, and is therefore, we submit, entitled to his indemnification from him.

#### JUDGMENT.

Sir *Wm. Scott*.—The difficulty of this case arises partly out of the embargo, which is a public act, and partly out of the bankruptcy of Mr. *Burnet*, which is a private misfortune. It appears that the goods were shipped in a *Spanish* port for the account and risk of *Burnet*, but under a charter-party executed by *Smith* and Co. of *Lisbon*, on behalf of *Burnet*, by which the master is bound to proceed to *London*, where the contract shall be held accomplished — “and the freighters bind themselves to cause to be paid to the captain by their correspondents in *London*, on and immediately after the unloading of the ship, 500*l.* &c.”

By the terms of the charter-party, the master sets off with two securities—the engagement of the freighters, and also his lien on the goods; he has a personal as well as a real security:—It appears that the goods were sold by *Burnet* before their arrival to Mr. *Wolff*: With this contract the master was wholly unacquainted; he looked only to the consignee, or to the freighter; Mr. *Wolff* was an entire stranger to him, except inasmuch as he became the representative of the consignee; the master's dependence was entirely on  
*Burnet*,

*Burnet*, from whom he appears to have received some advance of money. Then comes the act of the State, the embargo on all *Danish* vessels, which was a measure taken in contemplation of hostilities, and must be considered as discharging the lien, which the master had upon the goods. In the situation in which the two countries stood, the master had no right to make his demand against any subject of this country, being himself under detention, as well as the vessel on whose behalf this demand arises. The effect of this situation must, I think, be held to defeat the right which the master had possessed over his property, as a lien, entitling him to retain possession till his freight should be paid. The consequence of that will be, that his real security being defeated by accident, partaking of the nature of hostilities, he must be remitted to his personal security, against the persons with whom he contracted.

In the steps taken by the Government of this country, it was undoubtedly intended to use every precaution for the preservation of all interests that might be ultimately affected; and in the bonds, which this Court directed to be taken, on the delivery of goods under the embargo, the terms were drawn up as general as possible to answer all questions. I should have no doubt, therefore, that the bond would cover this demand, if it was one to which *Mr. Wolff* was in equity liable; but I am of opinion that he is not liable, inasmuch as he was no party to the contract, and obtained possession of the goods under a legal title — at a time, when the lien of the master for his freight was discharged, by the situation in which he stood as a *Danish* subject towards this country.

The  
THERESA  
BONITA.

March 26th,  
1802.

The

The  
THERESA  
BONITA.

March 26th,  
1802.

The claim of the master on the goods being lost, he is cast back to the personal security of his freighters, who must be responsible to him. They have engaged for the act of their correspondent as well as for their own. It is owing to their correspondent that the goods have become the property of Mr. *Wolff*; these persons are therefore responsible to the master. Under all the circumstances of the case, I am of opinion that Mr. *Wolff* is not liable to this demand, notwithstanding he has entered into the bond.

March 26th,  
1802.

#### THE TWEE JUFFROWEN, ETIES Master.

Tar and pitch,  
not being the  
produce of the  
exporting coun-  
try, contraband.  
Onus probandi,  
on the claimant.

THIS was a case of a cargo of pitch and tar taken in a *Prussian* ship, on a voyage from *Emden* to *Dieppe*, and claimed as the property of a *Prussian* merchant.

*For the Captors, Arnold argued*,—That pitch and tar going to the port of a belligerent, not being the produce of the exporting country, were subject to condemnation as contraband.

*For the Claimants, Laurence and Robinson*.—If the question of produce is so much relied on, the Court will admit farther evidence, as there is nothing at present appearing that in any manner points to that fact.

fact. Should these articles not be the produce of *Prussia*, they were unquestionably taken from warehouses at *Emden*, and may therefore be deemed to have been incorporated into the commerce of *Prussia*, being, in this respect, materially distinguished from the cases of neutral merchants in one country, who might be sending the produce of another country directly to the belligerent. In the case of the *Jonge Pieter*, in which the question turned upon a quantity of hemp taken on board a *Prussian* ship going from *Koningberg* to *Bordeaux*, the hemp was restored, although it is expressly said that it did not appear of what country it was the produce. Pitch and tar are entitled to as much indulgence at least as hemp, being an article of later introduction in the catalogue of contraband; as it is expressed by Sir *L. Jenkins*, that pitch and tar were not generally esteemed contraband in his time, unless prohibited by a special notification.

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TWER  
JURFROWEN.

March 26th,  
1802.

Cited in the  
*Apollo*, *supra*  
p. 162.

Life of Sir *L.*  
*Jenkins*, vol. 2.  
p. 751.

## JUDGMENT.

Sir *W. Scott*. — I take it to be the established doctrine of this Court, that pitch and tar are universally contraband, unless protected by treaty, or unless it is shewn that they are the produce of the country from which they are exported; in which latter case they are considered on the more modern and lenient application of the rule, as subject to pre-emption only. In certain instances, where they constitute the great staple commodity of the exporting country, as of *Sweden*, the presumption may be allowed in favour of the claimant without absolute proof: but in respect to *East Friesland*,

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*Friesland*, or any part of *Prussia*, the same presumption does not arise. The fact is not proved, in any manner, by the claimant, and I am inclined to think, that the presumption is on the other side.

With respect to what has been said of a different understanding prevailing in that country, I am afraid it is not the only instance in which our exposition of the law of nations differs from what they are inclined to hold upon the same article; but I must remember, that it is my duty to adhere to what I understand to be the exposition authorized by the former decisions of this Court, founded on general and disinterested views of the subject.

Under that exposition, I think myself bound to pronounce, that this cargo is subject to condemnation, as consisting of such articles as pitch and tar, which are not shewn to be the produce of the exporting country.

THE JACOB, BAER Master.

March 31st,  
1802.

(Instance Court.)

THIS was a question respecting the freight of a *subsequent* voyage, whether it was liable to be attached for payment of a bottomry bond, entered into on the part of the ship on a preceding voyage. The act on petition set forth the circumstances of the obligation in *Baltimore*, in 1800; the arrival of the ship at *Dublin*, *September* 1800; her departure from thence on a second voyage to *America*, and her return to the port of *London* in *June* 1801, where Mr. *Rucker*, the legal owner of the bond, had caused the vessel to be arrested, and had obtained a decree of this Court against the ship, tackle, and freight; the ship had been sold, and the proceeds, 911*l.* being insufficient to discharge the bond, the act farther alleged the freight which had been decreed to Mr. *Rucker*, by the afore said decree, or *primum decretum* of the Court, to be in the hands of Messrs. *Pedder* and Co. of *London*, and prayed that the Court would direct that freight to be brought in, and applied to the discharge of this bond.

Bottomry bond.  
—Freight of a  
subsequent  
voyage, under  
what circum-  
stances held  
liable for the  
bond.

*Against the demand, Laurence and Sewell.*—  
Bonds of this nature are not *suable* against the freight of a subsequent voyage; no case can be produced in which such effects have been ascribed to them. It is in its nature a maritime contract



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contract respecting the present voyage, in which the parties must be supposed to have contracted for the liability of the present freight, and the sufficiency of that freight to answer the demand in question. In other Courts, perhaps, means may be found of enforcing a personal claim against the owner on this demand. But *then* an opportunity would be allowed of excepting against the *quantum* of the demand, and of stating other objections arising upon it. This bond was entered into for the purpose, as it is expressed, of carrying the vessel from *Baltimore* to *Cork*, where the bond was expressed to be payable. It never was in the contemplation of the parties to hypothecate more than the freight of that voyage.

*On the other side, Swabey.*—The bond is by no means confined to the freight of the present voyage. The terms of it are to bind the ship, and the freight generally. To confine the terms to the actual voyage then in contemplation, would be to give the borrower the power of defeating the obligation, by his own act. In the present case, that effect would be produced; the bond describes a voyage to *Cork*, but in fact the ship never went to *Cork*. There was no opportunity of enforcing a demand there; the vessel went to *Dublin*, where the bond could not be put in force, as it had not arrived. The plaintiffs in this suit, therefore, are not chargeable with any laches; they have taken the first opportunity of prosecuting their claim. The defendant is now before the Court, praying to be released from this demand; but if he comes to ask justice, the Court will

will at least expect that he should perform justice, and satisfy the bond, out of the freight of the former voyage, which he does not deny that he has received.

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Jacoa.  
March 31st,  
1804.

On this hearing, the Court reserved the question for farther consideration, intimating as opinion, that the demand was sustainable, and within the terms of the bond.

## JUDGMENT.

Sir *W. Scott*. — This is the case of a bottomry bond, executed in *America*, where the master of an *Hamburg* ship bound himself, the ship and freight, for the payment of the money. The terms of the instrument are very general, and contain nothing that seems to restrict the application of them to one voyage. The bond binds the master, his heirs and executors, and also the said barque or vessel, and *her freight*; reciting, “ that whereas the master had  
“ borrowed of *Behn and Co. of Baltimore*, the sum  
“ of 16,770 dollars for the necessary service of the  
“ ship, to enable her to proceed on her intended  
“ voyage. And whereas the barque has been char-  
“ tered for the sum of 2,372*l.* sterling, to proceed on  
“ a voyage from *Baltimore* to *Cork*, and from thence  
“ to the port of *Waterford* or *Dublin*, as she may  
“ receive future orders: and whereas a sum of  
“ 1,126*l.*, part of the said freight, has been paid in  
“ advance by the charterer to the said master, and  
“ by him handed over to the said lender, *Behn and*  
“ *Co. &c.* The condition of this obligation is, that  
“ if

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“ if the said barque shall, with all convenient speed,  
“ proceed and sail from the port of *Baltimore*, on  
“ her before-mentioned voyage, to *Cork*, the dangers  
“ of *the sea* and *enemies* only excepted; and if the  
“ aforesaid master shall cause to be paid to the afore-  
“ said *Behn*, or his attorney, within twenty-five days  
“ after the arrival of the said barque at *Cork* afore-  
“ said, the remaining sum of 31,476 marks banco;  
“ or in case an utter loss of the said barque, or vessel,  
“ shall happen during her aforesaid voyage, then the  
“ aforesaid obligation shall be void, or else to remain  
“ in full force.”

It appears that the ship sailed from *Baltimore*, and arrived *not* at *Cork* but at *Dublin*, though I do not see that there is any reason to impute a fraudulent purpose to this deviation. On her arrival at *Dublin*, the ship discharged her lading, and sailed away, the bond not having been paid. She returns again to this country, and is arrested for the payment of the bond. The ship has been sold, and now, the proceeds not being sufficient to discharge the bond, the freight of this latter voyage has been attached. The *act* of Court which has been entered into between the parties, discloses the ground on which the obligor considers the present freight not to be liable, *viz.* “ that  
“ the ship took in goods of *Behn*, the lender of the  
“ money; that the hypothecation of freight alluded  
“ only to the former freight; that great inconvenience  
“ would arise to the owner of the vessel, if this  
“ freight was to be substituted in the place of the  
“ former freight, because the owner of the vessel  
“ had destined it for another purpose,” for which  
they

they were personally liable. — This is the whole of the plea. The disposition of this Court would certainly be, to uphold the efficacy of bonds of this nature, as far as is consistent with law: They are bonds of great sanctity, and highly necessary in mercantile affairs, and therefore the Court would be inclined to support them, as far as the justice of the case will admit.

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Marrs 31st,  
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Let us consider what the justice of this case is? — It appears to me, that a more unconscientious resistance to a demand could never have been made. The ship went to *Dublin*, and was discharged, as it is stated on the part of the plaintiffs, before the bond arrived; such an accident must, I conceive, be a matter of frequent occurrence: bonds of this sort cannot safely be sent by *the vessel* to which they relate — some other conveyance must be found, and it seems to me, that it must be a matter of chance, almost in every instance, whether the bond or the vessel shall first arrive at the place of destination. It has been said in argument, that the agent in *Dublin* might have been apprized, and that orders should have been sent to him to withhold the freight; and that the omission of this precaution amounts to some degree of laches, on the part of the plaintiff. But, I am of opinion, that the parties who were to pay the freight in *Dublin*, could not have declined to pay it, on the demand of the master. The master might have refused to deliver, without the payment of freight, and if the agent had alleged orders to retain, the master might naturally have asked to see the bond. However that might be, the master *did* actually receive the freight, and deposited it with the proprietors at

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*Hamburgh*; the defendants admit this, and also, that the money is due on the bond; but their excuse is, that great inconvenience will arise to them, if they are obliged to pay it. To admit that the money is due, and to stand only on the inconvenience of payment, seems not to be a very rational answer, to be given in a Court of justice, in opposition to the legal demand.

It is stated, "that the owners are *not* personally bound by this bond—that the master may bind the ship, but that he cannot bind the person of his owner."—So, that these parties standing under *no personal obligation* for this money, desire to be released also from all real obligation. To my apprehension this is not a very modest request. I desire not to be understood, as laying down any general rule for all circumstances, and all cases, where any third party may have become interested in the freight of the subsequent voyage. I lay down no such rule. In this case, there is no person concerned but the owner of the ship, and the holder of the bond. The owner admits that he has received what he ought not to have received; and I think I shall not exceed the proper limits of the jurisdiction of this Court, which exercises, I hope not unduly, a wide equity, under the terms of its commission, in ordering that the freight of the subsequent voyage, which is in the custody of the Court, shall be answerable for this demand. It has been suggested that there are some objections to the accounts, but they have not been put in issue. I shall refer it to the registrar and merchants to report what is due, and pronounce this freight liable to that amount.

## THE NAYADE, MERTZ Master.

April 6th,  
1802,

THIS was a case of a quantity of cotton and sugar, taken in 1801, on a voyage from *Lisbon* to *Bordeaux*, and claimed on behalf of Mr. *Beljeian*, describing himself as a *Prussian* merchant, though resident in *Lisbon*.

Trade with the enemy, on the part of a merchant, of an ally in the war, illegal. Property subject to condemnation in the Prize Court of the captor's country.

*On the part of the Captors, Swabey contended—* That Mr. *Beljeian* could be considered in no other light than as a merchant of *Portugal* where he resided. That as such, his property taken in trade with the enemy of *Portugal* and *England*, allies in the war, must be subject to confiscation, on the authority of the *Enigheid*, [supra 1 Adm. Rep. p. 210.]

*For the Claimant, Laurence contended—* That the point of law relied on was not made out; that the *Enigheid* did not by any means establish the principle.—

[*Court.* — I think the law is perfectly clear; I have reason to remember the whole of that case; it was a case argued by myself, and one which went up to the Lords under my advice. I had an opportunity of hearing the deliberation of the Lords upon it, and I know, that it was decided on the ground, that during a conjoint war, no subject of one belligerent can trade with the enemy, without being liable to a forfeiture of his property engaged in such a trade, in the Courts of the ally.]

*Laurence then argued—* That there was nothing to shew that *Portugal* was at that time at war with *France*. That if the Government of *Portugal* submitted to suffer injury

The  
NAYABE.

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injury and indignity rather than give a pretext to the rapacious ambition of *France* by declaring war, merchants resident within that country were entitled to the benefit of a state of peace. It was argued *also*, that the claimant was a subject of *Prussia* resident in *Lisbon*, where foreigners settled in factories considered themselves as still retaining their native character; and *further*, that it was not to be presumed that such speculations would be entered into without the licence and permission of the State.

*Swabey replied* — That with respect to the state of war, there was an unequivocal evidence on board this very vessel; there being a certificate purporting to be signed by ———, the *French* commissary for the management of *French* prisoners in *Portugal*.

#### JUDGMENT.

Sir *W. Scott*. — This is the case of property claimed for a person who was first described in the claim “as a *Lisbon* merchant, and a subject of Her Majesty the Queen of *Portugal*.” Since the time of giving in the claim, it has been thought convenient to alter that description, and to represent him “as a subject of the King of *Prussia*, resident in *Lisbon*.” It is admitted, however, that he is resident in *Lisbon*, and the question will be, whether that fact is not sufficient to preclude him from receiving the restitution of this property.

It may be necessary to consider in the first place the situation in which *Portugal* then stood. The relation which that country has borne towards *France*, at different periods, has been extremely ambiguous. At first

first there was a wish on the part of *Portugal* not to consider herself as being at war with *France*; and if a submissive conduct, and a disposition not to resent injuries, could have afforded protection against the violence of *France*, she might have escaped: But it is equally notorious, that all these concessions were made without success, and proved utterly inefficacious to prevent *Portugal* from being implicated in a war with *France*.

The  
Navarra.

April 6th,  
1808.

In cases of this kind, it is by no means necessary that both countries should declare war. Whatever might be the prostration and submissive demeanour on one side, if *France* was unwilling to accept that submission, and persisted in attacking *Portugal*, it was sufficient; and it cannot be doubted by any body who has attended to the common state of public affairs, that *Portugal* was considered as engaged in war with *France*. Without adverting to particular instances, it is notorious and evident from this very case, that there was a *French* Commissary stationed at *Lisbon* for the regulation of *French* prisoners. At the time of this transaction, *Portugal* must, indubitably, be taken to have been at war with *France*.

But it is contended, that this Court is not competent to take cognizance of the fact of a subject of an allied Power trading with the common enemy. I am of opinion that the case of the *Enigheid* has effectually disposed of that question. On the part of Mr. A —, a *Dutch* merchant, who was engaged in that transaction as a partner with Mr. *Hankey*, it was in that case contended, that we had no right to inflict forfeiture on a subject of *Holland*: — But it was replied, that it was no particular law of this country, that inflicted

such



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NAVY.

April 6th,  
1802.

such a penalty, but that it was an universal principle of the law of nations, and that it would place this country in a very disadvantageous situation (a) indeed, if the subjects of an ally in war might trade with the enemy, whilst the property of *British* subjects so employed was subject to confiscation. In that argument some cases relating to the *German* States are adverted to. But they stand on a very different footing as free cities; and it was understood to have been the ancient constitution of their connection with the Empire, that they were not precluded from trading with the enemies of the Empire. On these considerations, the Lords in those cases did not think proper to press the principle upon them.

It is suggested here, that there might have been a licence: When that is relied on to create a privileged

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(a) 1705, when *England* and *Holland* were allies in war against *France* and *Spain*, it was at first (according to the general policy) attempted to prevent all trade with the enemy on the part of *English* and *Dutch* merchants, and several *Dutch* ships caught in the act of trading to the enemy's country were captured and brought into this country. It appeared afterwards to the *English* Government, that, as the *Dutch* Government encouraged their merchants to trade to *Spain* under passes, it would not be in the power of *England* effectually to prevent this trade, and that it might prove very detrimental to *England* if *Holland* should by this opportunity gain possession of the bullion trade, and retain it after the war—Under these considerations, the *English* Government issued an order, August 1705, for the liberation of all *Dutch* ships so detained, and directed *English* cruizers for the rest of that war not to molest *English* or *Dutch* ships sailing on a trade to *Spain* under the passes of their respective Government, “since Her Majesty has opened the trade with the enemy.”—*Sea Laws*, p. 668.

exemption

exemption in favour of any particular transaction, it is necessary that the licence should be distinctly alledged and proved. No proof is offered of any such thing, it rests merely on the suggestion of Counsel. Then the case is reduced to this question, whether, there being factories at *Lisbon*, a person resident there, as a member of any particular factory, might so far retain his *original* native character, as to protect him in trading with the enemy of *Portugal*? I do not know that persons resident in factories at *Lisbon* are permitted by the laws of *Portugal* to trade with the enemy of that country. But even if it were so, it must be shewn that there is a *Prussian* factory at *Lisbon*. In a former case (a) it is within the recollection of the Court, that this gentleman claimed as a *Portuguese* merchant; and there can be no doubt that it was his first intention to claim in that character in the present case. I see no ground on which I can distinguish the case of this claimant from that of other *Portuguese* (b) merchants. If there is any such principle in the law of *Portugal*, as that foreigners settled in factories there may trade with the enemy of the State, it is fit that it should be fully proved and established before the superior Court, and it will then be for that Court

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NAYADE.

April 6th,  
1802.

(a) Carl Wake,  
*supra*, p. 207.

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(b) In the case of the *Danous*, Lords, March 17, 1802. Mr. ———, a *British* born subject, resident in the *English* factory at *Lisbon*, was allowed the benefit of a *Portuguese* character, so far as to render his trade with *Holland* (at war with *England*, but not with *Portugal*) not impeachable as an *illegal trade*. — Farther proof was ordered to be made of the property.

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NATANAEL

April 6th,  
1802.

to consider, how far such a principle can be admitted, under which all the trade of *Portugal* with the common enemy might be carried on, notwithstanding the state of war.

I do not feel that it would be fit for me to establish any such principle, and I think I am bound to reject this claim.

April 30th,  
1802.

### THE CAROLINA, NORDQUIST Master.

Ship lost in the possession of the captors, by accident and stress of weather, after capture, on the ship's egress from Alexandria, after having served as a transport in conveying the French forces to Egypt. Seizure justifiable. Captors not deemed responsible.

THIS was a case on petition, respecting the loss of a *Swedish* vessel, captured at the taking of *Alexandria*, and lost in the possession of the captors, before she had been brought to adjudication.

*On the part of the Captors, the King's Advocate. —*

The situation and character in which this vessel was taken, are such as fully justify the seizure, and thereby exonerate the captors from being answerable for the loss, which is admitted to have happened without any imputation of neglect on their part. The ship was a *Swedish* vessel, which had served in the *French* expedition to *Alexandria*, as a transport to convey troops, &c. When the port of *Alexandria* was invested by the *British* forces, a notification was sent in, giving permission to all neutral vessels to depart. This ship did not avail herself of that permission, or set sail till four days afterwards, and the only excuse offered for the delay was, "that the

*French*

*French* commander would not permit her to sail before." On board were found bills on the *French* government, and letters from the *French* commander, by which the fact of her having served as a *French* transport is fully proved.

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*On the part of the Claimants, Laurence.*—It is not imputed to the *British* commanders, that there has been any moral misconduct on their parts. There has, however, been this loss sustained, for which they may be responsible, if it should appear that it happened whilst the property was kept in their possession, without any justifiable grounds of detention. On what principle can it be contended that this vessel *would have* been subject to condemnation? As a *French* transport? Certainly not. If she had been taken on the outward voyage, such a principle could not have been enforced against her, impressed as she was into that service by duress and violence. But the whole of that offence had been discharged. The troops had been landed, and the ship was captured on her return, and after an indiscriminate invitation or declaration to all neutral vessels, encouraging them to depart. The declaration contained no exception against ships which had brought *French* troops, nor any intimation that they would be considered as *French* ships; it was absolute and unconditional. If it is now to be made subject to such an interpretation, it will operate as a snare on all those who took advantage of it. The delay of four days, which is mentioned to have taken place before the sailing of this vessel, can make no distinction, since it proceeded chiefly from the situation of the winds. When the proclamation

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tion my opinion is, that a man cannot be permitted to aver, that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands, must seek redress against the Government that has imposed the restraint upon him. He has no right to expect that the *British* government should pay for the injustice of its public enemy. If this vessel had been taken in *delicto*, I should have felt no hesitation in saying, that she must have been subject to condemnation. Whether the troops were received on board voluntarily, or involuntarily, could make no difference.

Then as to its being a by-gone transaction,—had she divested herself of the character of a *French* transport? Had she *so* receded from that character, *as* is represented? She was remaining under the power of the *French* military commander as much as ever. She had solicited leave to depart, but could not obtain it; and if the *English* fleet had not appeared, she might have been employed to carry on the dragoons to some other place, in the same manner as she had been employed before. I can by no means accede to the description given in argument, or consider her as having removed herself from all taint, arising out of the preceding contract. When the *British* fleet appeared before *Alexandria*, the *British* commander did, with a tenderness to neutral commerce,

merce, which is highly honourable to him, give liberty to neutral vessels to depart. But although this notice was given in general terms, *to neutral ships*, it was not given absolutely to all, that were neutral *in built and property*, but to such as were neutral likewise in their conduct, and were acting fairly under that character. The very terms of the letter are, “to all such as are *legally employed*.” This ship was still subservient to the purposes of the *French* commander, who refused to let her depart, till the arrival of the *British* fleet rendered it impossible for him to make any farther use of the vessel. Under these circumstances, what right or pretence had this vessel to claim the privileges which belonged only to those who had conducted themselves as neutral, or to claim the protection of that proclamation? On the first attempt to come out it appears she was taken, and under circumstances which do in my opinion fully justify the seizure. But, it is said, the captors were in fault, for not proceeding *immediately* to adjudication! It must be conceded, I think, as a reasonable distinction, that commanders acting in the management of great expeditions, cannot be tied down exactly to the same rules, by which individual cruizers are directed to proceed. If the vessel *had been* brought to adjudication, so far am I from thinking that it would have availed the claimants, that it rather appears to me there would have been strong grounds on which the captors might have been entitled to condemnation. It is said that the master was separated from his ship—but if we consider that he was a person who had appeared to engage his vessel voluntarily as a *French* transport, there might be very good rea-

sons

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CAROLINA.  
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sons why it would not be improper to remove such a person. On the whole, I can by no means hold that this is a demand fit to be enforced in this Court.

It appears, that there were on board some bills of exchange on the *French* government ; and it is made part of the prayer of the claimant, that the Court will direct the captors to deliver them up.—On what grounds can it be expected that this Court will busy itself to assist in enforcing a demand for what is to be considered as the *pretium læsæ fidei* ? Is there a principle more universal than that Courts of justice will *not* carry into effect an illegal contract ? In some instances it may have been doubted (*a*) whether the Court of Prize can properly take notice of a breach of our own municipal laws. But in respect to the law in question before us, can it be said that the Court of Admiralty shall lend its aid to carry into effect a contract which is in direct violation of *the law of nations*, that very law which it fits to administer ? The parties must resort to the *French* government, and settle their accounts with them as well as they can. I have no hesitation in rejecting the whole of this petition, with costs of the petition against the claimant.

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(*a*) It has since been *determined* in several instances, that a *British* subject cannot come before a Court of Prize to claim property taken in a course of trade which is forbidden by the laws of his country ; and in the case of the *Etrusco*, Lords, 11 August 1803, it was decided, after long deliberation, that property condemned in consequence of the *inadmissibility* of such a claim, *is to be condemned* not to the individual captor, but to the King.

THE JONGE JOHANNES, PARLERLIET  
Master.

May 4th,  
1802.

THIS was a case of a cargo of flax, taken on a voyage from *Rotterdam* to *Stockton*, and other ports in the north of *England*, and consigned to sundry merchants there, by bills of lading, expressing *their account and risk*. The claim was given for the various proprietors by Mr. *Smith*, one of the partners of the house of *Bridge and Smith*, of *London*, stating, that a licence had been taken out for this shipment by their house, in consequence of letters from their correspondents. On the part of the captors, it was objected that this cargo could not be protected by the licence, in the manner in which it had been used; that the licence was only to *Bridge and Smith*, or *their agents*, or *bearers of their bills of lading*.

Licence so applied, as not to conform to the terms. —  
Condemnation.

On the other side, *Arnold and Robinson* argued, — That there was nothing to impeach the good faith of this transaction; that it might therefore be permitted to come under the precedent of the *Christina Sophia*, in which the Court did permit other parties to come in and protect themselves, by having agreed with the holder of the licence, to take part in the shipment made under it. The present case affords a strong presumption, that the licence was not meant to be confined solely to the property of *Bridge and Smith*, inasmuch as the words are very

Supra, vol. 4.  
p. 12.



The  
JONGE  
JOHANNES.

*May 4th,*  
1802.  
(a) Vide  
licences infra.

general, allowing an almost indefinite importation in *three neutral ships (a).*

#### JUDGMENT.

Sir *W. Scott*.—In all these cases, in which the utmost innocence of intention appears on the part of persons claiming under such licences, the Court is certainly very desirous to extend the privilege granted for their protection, as far as it can, without sacrificing any principle of law ; but if either, from the inexperience of the parties, in making the necessary application, or from any inaccuracy in the office where the licence is granted, the defects are such, as put the case beyond all principle, the Court may lament the loss which the parties will sustain, at the same time that it may not feel itself authorized to relieve them. The great principle in these cases is, that subjects are not to trade with the enemy, without the special permission of the government ; and a material object of the controul which government exercises over such a trade is, that it may judge of the particular persons, who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war.

The question for me to consider will be, whether under these observations, the claimants are entitled to engage in this trade, either under the words of the licence, or under any authority fairly derivable from it *Bridge and Smith (b)* obtained a licence to import, *at*  
*for*

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(b) On which day, appeared personally, *Richard Smith*, and made oath, that on the 20th of *January*, his house of trade obtained

*for themselves, their agents, or holders of their bills of lading.* It is not pretended that the application was made in the names of any other persons, who were to be concerned in the importation. The form in which the licence is expressed, is, "that *Bridge and Smith* were to be importers," so far as to be able to transfer their interest to others, not originally concerned in the transaction. Is it possible to say that these parties come under either of the descriptions of persons

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tained a licence, &c. &c. &c. (as hereafter printed,) and that his said house of trade communicated to their said correspondents, their having obtained such licence, and in consequence thereof, the several parcels of goods mentioned in the schedule, referred to in the claim hereunto annexed, were shipped at *Rotterdam*, on board the said ship *Jonge Johannes*, documented as, and appearing to be, a *Prussian* ship, consigned to this deponent's said house of trade, by a bill of lading on board, and a duplicate thereof forwarded to this country, and which said several parcels of goods were so shipped for the account and risk of the several persons, and in the proportions mentioned in the said schedule, as this deponent verily believes.

GEORGE R.

*George* the Third, by the Grace of God, of the United Kingdom of *Great Britain*, and *Ireland*, King, Defender of the Faith, &c. To all commanders of our ships of war, and privateers, and all others whom it may concern, Greeting; our will and pleasure is, that you permit Messrs. *Bridget and Smith*, or their agents, or the bearer of their bills of lading on board three neutral ships, the names of which they are unable to set forth, (the same being *American*, *Prussian*, or ships belonging to the *Hanse Towns*) to import without molestation from *Rotterdam* to the ports of *Leith*, *Banff*, *Dundee*, *Berwick*, *Newcastle*, *Stockton*, *Alnwick*, *Arbroath*, *Mon-*

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persons mentioned in the licence. *Bridge and Smith* are certainly *not the importers*, because the real and effective bills of lading consign the goods to other persons; they cannot claim any interest before the Court. Are the claimants *the agents* of *Bridge and Smith*? Certainly not. That house appears rather to act as the agents of these persons, and to have no original interest in the shipment. Then the only possible character in which the claimants can stand before the Court, is that, of *bearers of their bills of lading* — as deriving a title from bills of lading transferred from *Bridge and Smith*. There was a general bill of lading on board, consigning the property to *Bridge and Smith*, but it appears clearly

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*trose, Peterhead, Kirkaldie, Cromartie, Findhorn, Aberdeen, and Nairn*, such quantity of barilla, shumac, grain of all kinds, salted beef and pork, salted provisions of all kinds, *bides and skins* (not being the produce of *South Prussia*, or of the *New March of Brandenburg*) *saccarum saturni*, smalts, stone bottles, butter, cheese, clinkers, terrass, *flax, flax-seed, clover and other seeds*; madders, roots, leather, rushes, hoops, yarn, *Geneva*, white lead, and oil, (being *British or neutral property*) as may be specified in their bills of lading, provided the same shall be shipped as aforesaid. This licence to remain in force for the space of six months from the date hereof, and no longer. Provided also, that any person who shall claim the benefit of the licence hereby granted shall take and have the same upon condition that if any question arises in any of our Courts of Admiralty, or elsewhere, whether such person or persons hath or have, in all points, conformed thereto, in all cases whatsoever, the proof shall lie upon the person or persons using this our licence, or claiming the benefit hereof. Given at our Court, at *Saint James's*, the 20th day of January 1801, in the forty-first year of our reign.

Examined.

By His Majesty's command,

PORTLAND.  
that

that this was meant to operate only as a *formal paper*, by which no right whatever was to be conveyed; there being other bills of lading on board, by which the master was bound to deliver the several parcels to the order of the *Dutch* shippers.

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Then how can I restore these goods under either of these titles? The only persons to whom I am authorized to restore, are *Bridge* and *Smith*, as *importers*, or *their agents*, or *persons holding their bills of lading*, and claiming under bills of lading, which *Bridge* and *Smith*, after having conducted the importation from the enemy on their own account, had transferred to them. Seeing that there is no apparent violation of good faith towards the public, in the parties interested in this claim, I am sorry to be obliged to pronounce, that there is no character in which they can receive restitution.

Then is this case entitled to the same indulgent consideration as the Court applied to, one which is represented as a similar case, the *Christina Sophia*? In my opinion they are *not similar* cases. In that case, Mr. S— made oath that he intended to include the several persons, and that he took a licence for himself and Co. meaning to include them under the denomination of Co. The Court, under these circumstances, did accede to the favourable suggestion, that the *Irish* government might be apprised of the intention of including all the persons—that Mr. S. might have stated the names, and then have taken a licence in an abbreviated form. But can this be said of the present case? *Bridge* and *Smith* take a licence *for themselves* only, and I have

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already said, they can have *no agents*, since they appear never to have had any interest. If this accident has happened by inadvertency on their part, or from want of a correct form in the office granting the licence, the parties may take the opinion of the Superior Court. If that Court should feel itself at liberty to give a more favourable construction to this claim, I cannot say that I should be sorry; but I do not feel that these goods can be restored by me, without my taking upon myself to say, what I hardly conceive I am upon any principle warranted to declare, that when a licence is granted *to one person*, it may be extended to the protection of all other persons, who may be permitted by that person to take advantage of it.

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#### THE THREE FRIENDS, HEFFERON Master.

Salvage on property, destroyed by fire before the appraisement had been executed — the property held to be still under custody of the Court — loss common to both parties — demand for salvage on the original value, overruled.

THIS was a case respecting a ship and cargo re-captured from the enemy, and restored to the proprietor, on bail, to answer salvage, but destroyed by fire before the appraisement of *the cargo* had been completed. The question was, whether the re-captor was entitled to salvage according to the value before, or after the accident.

*For the Re-captors, the King's Advocate and Sewell.*  
— The act of restitution was complete, as far as the re-captors were concerned; they had delivered the property to the master for the benefit of the proprietor. The appraisement was delayed by the act of the proprietor

prietor till after the accident had happened. The prize-master had been withdrawn, and the whole property had been given up, to the agents of the proprietor, and therefore the captors are entitled to their reward, according to the value of the property restored by them.

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*On the other side, Swabey.* — This was the case of an American ship and cargo, re-captured from the French, and carried into the Tagus. The re-captors having consented to restitution, *on bail being given to answer salvage*, it was necessary that an appraisement should take place. It had already been executed on the ship, and on part of the cargo, which was landed. Commissioners had been on board to complete the valuation of the remaining part of the cargo, but by some accident it was delayed. In the mean time a fire broke out, by which the property was consumed. In this state of things the risk must fall on the several parties according to their respective proportions. In the case of the *Creighton* (a), before the Lords in the last war, a similar question arose on a ship re-captured, and delivered to the proprietors, on agreement to take the value by an eventual sale. In the mean time, before any appraisement was made, the ship ran against the sterlings of *London Bridge*, and was lost. The re-captors demanded salvage, but the Lords of Appeal decreed against their claim, holding, that as the accident happened before appraisement, and without the fault of either party, the re-captors were to sustain their share of the loss. The only difference between that and the present case is, that the delivery was on bail in this case, *in that only on agreement*. We could

(a) *Creighton*,  
Lords, 8th Feb  
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not be said to have legal possession, till after appraisement had taken place, we are not, therefore, to be called upon to indemnify the captor for his share of the loss, which, we submit, he ought to sustain in common with us.

*In reply, the King's Advocate and Sewell.* — The case of the *Creighton* differs materially from the present case. There the agreement was to await the eventual sale, in which the captors were interested as well as the claimants. Here no benefit would accrue to the re-captors from the delay. Possession was given up merely for the convenience of the proprietors, and they were actually employed in the repairs of the ship when the accident happened. In the *Creighton* it is to be recollected, also, that the accident happened from removing the ship under the agreement to bring the cargo to sale. There was to have been a saving of the expences of lighterage, &c. in which the re-captors had a joint interest, and therefore *they* were fairly chargeable with their proportion of the loss. Under these distinctions the authority of that case will not apply; the present loss is to be borne entirely by the claimants, as parties in possession for their own interest. The re-captors are entitled to be rewarded according to the value, when they gave up possession. In a late case (a) before the Lords, captors were held responsible for property restored on appeal, although it had been destroyed by an extraordinary flood on the quay at *Jamaica*, about a month after condemnation, and ten days after the sale, but before any actual delivery or conversion, from whom they received any profit. By parity of reasoning, as the responsibility attached in that case,

(a) *Rising Sun*,  
Lords, 15 July  
1801.

case, not according to the benefit derived to them, but according to the term of their actual possession, so in this case, their reward ought to be regulated by the value of the property as it stood at the time when *their possession ceased*, and the goods were actually transferred to the other party.

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19th May. — JUDGMENT.

Sir *W. Scott*. — This question arises on an accident, which carries with it neither censure nor penalty to the parties concerned: Owing to accident more than to the fault of any party, the ship and cargo were consumed by fire in the harbour of *Lisbon*. As both ship and cargo were property taken out of the hand of the enemy, they were, though neutral property, to be restored on salvage according to the usage of the present war. A commission was necessarily extracted for the valuation of the property. As to the ship, it had already been executed; but on the cargo it had only been begun, when a fire broke out on the 2d of *September*, and consumed the whole property. The question is, by what valuation the salvage is to be decreed? Whether according to the value of what may be remaining, or according to the valuation of an appraisement, such as can now be made upon the original value of the property, unaffected by any such accident.

The Court had decreed restitution, and had issued a commission of appraisement, by which two shipwrights had been appointed to appraise the vessel, and two brokers to appraise the cargo. It is stated on one side in the act, "That the commissioners for the cargo went on board, and finding the prize-master absent returned back; that they went a second time, but did not proceed to business for the same reason,



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because the prize-master was not on board. On the same evening the fire broke out, and consumed the remainder of the goods." It is, I perceive, represented a little differently on the other side; there it is alledged "That the prize-master was withdrawn, and that the ship and cargo had been put into the possession of the former master, for the account of the respective proprietors." With respect to the ship, it appears that the appraisement had been completed, and only waited to be confirmed by the Court. On that point, therefore, I have no hesitation in considering the appraisement as substantially executed, and the ship as restored to the possession of the owner. I shall, therefore, feel no difficulty in pronouncing for salvage according to the entire value of the ship so ascertained by appraisement.

(a) Creighton,  
Henderson,  
Lords, 8th Feb.  
1782.

The difficulty arises as to the cargo. A case has been cited from the last war, which I remember perfectly well. It was the case of a ship (a) brought into the *Thames* for the purpose of conveying the cargo to the *London* market. The Court in that case was of opinion, as I understood, that the removal took place under a joint speculation of advantage, as to the most beneficial manner of disposing of the cargo. The ship was considered as detained for the advantage of both, and consequently at the risk of both, and therefore the re-captors were to be affected with the loss *pro rata*, upon an accident of the like nature which took place in the river *Thames*.

But is that decision a direct authority for the present case? I cannot think that it is; for here no agreement appears to have been entered into between the parties; the necessary measures were proceeding in the ordinary course of the practice of this Court, without

without being influenced in any manner by the agreement of the parties. A case depending on the agreement of the parties cannot, therefore, be cited as an absolute authority, for a case proceeding only under the ordinary practice of the Court.

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Then it comes to be a question, what is the actual *liability* of the cargo, under such circumstances, independent of any agreement? — I do not mean a penal *liability*, but a mere liability, as to the extent of the salvage charged upon it; for no party is in *delicto* or answerable for any wrong imputed. That question must be determined by considering in whose custody the cargo then was—whether it was so completely restored to the exclusive possession of the claimants, as that the Court and the other party had lost all power and controul over it? Or whether it was still in the possession of the Court, by its commissioners, or by the agents of the parties? For it makes no great difference, in my apprehension, whether the prize-master was still on board, or was withdrawn, with a view of accommodating the other party, if those who were put into his place, are to be considered as being there by the consent of the re-captor, and *pro hac vice* as much his agents as agents of the claimants.

On this point, I am disposed to think, that the property was still in the possession of the commissioners of the Court, in order to ascertain the value, before the claimant could be remitted into complete possession. The ship might have been taken away; but could the owner of the cargo have taken *that* away? Unquestionably not. The cargo was to remain till the value could be ascertained, and must, during that time, be considered to be in the custody  
of

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of the Court. If the commissioners constituted the master of the ship to be keeper of the cargo, whilst it was under their care and management, it does not divest them of the legal custody. With them the legal possession must remain, till the purpose of the commission was executed; and whatever happens during that interval, must be at the common risk of both parties. What is the fact during such a situation? The prize-master is usually continued on board, and if in one instance he is withdrawn, still the person to whom his possession has devolved, must be taken to be substituted in his place. The property must still be considered as in the power of the Court, till the value is ascertained, on which the decree is ultimately to be founded.

But there has been a return made *since* the accident, of a valuation which is in fact nothing less than an appraisement, estimated partly by conjecture, and partly by the invoice charges, above twelve months after the property itself has been consumed. Who can say that this is a fair mode of valuation, or that there had been neither deterioration nor embezzlement? If the invoice alone could be deemed conclusive as to value, all the purposes of a commission of appraisement would be entirely useless. The return of the commission itself states, "That some part of the flax had been damaged by water, and was, on that account, obliged to be unpacked," from which it appears on the very face of this transaction, that the invoice cannot be taken as a just measure of the real value.

On the whole circumstances of this unfortunate case, I am of opinion, that till the valuation was taken,

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taken, the intervening accident must be held to be at the risk of the joint property, remaining under the custody of the Court, for the purposes of justice, and therefore that the loss must fall upon both parties, in the proportion of their several interests.

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## THE SISTERS, *Stokes* Master.

June 15th,  
1802.

(Instance Court.)

**T**HIS was a case of possession, in which the ship then in the possession of Mr. *Tubbs*, had been arrested on the part of Mr. *Charnock*. An allegation had been given in on the part of Mr. *Charnock*, stating, that he purchased the ship of the Marshal of the Court, and that he had not executed any assignment of the bill of sale, nor otherwise disposed, or transferred the possession of the vessel to any person, [vide 3d Adm. Rep. p. 213.] On the other side, an allegation was now given on the part of the assignees of the estate of *Tubbs*, pleading several letters and exhibits, and alledging "That *Charnock* bought only as agent of *Kirkpatrick*, from whom *Tubbs* derived his title, and that part of the purchase-money had been paid to *Charnock* by his employer. A correspondence was exhibited, which was asserted to have passed between them, for the purpose of shewing that *Charnock* acted only as agent of *Kirkpatrick*."

*Cause of Possession — Quære, how far the Court of Admiralty can be considered as merely ministerial to decree possession, on the bare legal title, under possession of the bill of sale, in opposition to the equity of the case.*

*On the part of Charnock, the King's Advocate contended — That he was in possession of the legal title,*  
*the*

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*the bill of sale*; that if any collateral accounts were brought forward to defeat this title, they were not fit subjects of discussion in the Court of Admiralty. That the Court would not proceed *on them*, to pass a judgment as to the possession of the ship, because it had not the power of looking farther, in order to make such a decree, as the Court of Chancery would perhaps make, for a general balance, and for the payment of such money as might be still due on this account to Mr. *Charnock*. The Court of Admiralty could not perform full justice in this respect, and therefore it would give Mr. *Charnock* the benefit of *his legal title*, on which he stood. It was said, that the bill of sale was made to *Charnock*, by the direction of *Kirkpatrick*; that the reason for this order did not appear, but it might be intended to give *Charnock* a lien on the property.

*On the other side, Arnold and Laurence.* — Although the Court might not think itself authorized to make a mere equitable title the ground of a decree of possession, or might not hold such a claim sufficient to warrant an arrest and judgment in favour of such a title, in opposition to the holder of the bill of sale; it is a very different thing, when the holder of the mere formal title comes to demand the aid of the Court, to put him in possession in opposition to the *equitable title*; Mr. *Charnock* stands in this predicament. He had been employed in this transaction, merely as agent of *Kirkpatrick*, he had given the ship up to the possession of his employer, and now comes forward on the bare possession of the bill of sale, and in opposition to every equitable principle, desiring the  
Court

Court to interfere to divest *Tubbs* of the possession, and transfer it to him.

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*The King's Advocate.* — All the parties are since become bankrupts, and the question is, whether *Charnock* shall be stripped of his *legal* title, without retaining so much as is due to him on the purchase.

*Court.* — How does it appear that there is any money due to *Charnock* on this account. That may be a material fact : because I am not disposed to hold as a clear recognized principle that in suits of possession, this Court is *absolutely ministerial*, and that it is in all cases bound to give its aid. If Mr. *Charnock* has already acted in such a manner as to put the property into the possession, and at the disposal of the person for whom he bought, as agents, the Court may perhaps think itself at liberty to hold its hand, and leave all the parties to find their proper remedies in a Court, which can look into the whole of the transaction, and dispense all the justice that belong to every part of it.

But if the money has not passed to Mr. *Charnock*, for the payment of this purchase, which it is alledged he made merely as agent, then the equity of the case will be against Mr. *Tubbs*. Can it be shewn that the money for this purchase has been specifically paid, as it has been asserted?

*The Proctor for the Assignees of Tubbs* — said, he was instructed that it could be shewn.

*Court.* — Then let this matter stand over at present ; these papers are consistent with a supposition, that the purchase

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purchase was made for *Kirkpatrick*. But if the funds failed, and *Charnock* was not indemnified, it would be hard to deprive him of the benefit of his legal title, supported as it would be in that state of circumstances, by an equitable title also.

Allegation amended, to plead the fact of payment.

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#### THE FORTUNA, TADSEN Master

Freight due to captors, in virtue of the ship, which had been condemned, when the cargo is carried by them to the place of its destination.

THIS was a case on petition of the captors, praying to be allowed freight for a cargo, which had been restored as neutral property. The demand for freight was founded on a suggestion, that *the ship*, which had been condemned, had actually performed the contract of the original affreightment, by carrying the cargo to the place of its destination. It had been objected on a former day, that as the decree of restitution had passed without any order respecting freight, it was not competent for the Court now to entertain a new suit, on property which had actually been restored.

In answer to that objection, it was said, that although a decree of restitution had passed, the proceeds had not been paid out of the registry; that so long as they were in the custody of the Court, it was competent for the Court to make a new order respecting them.

It

It appeared that after the decree of restitution had passed, the proctor for the captor had entered a caveat in the registry, warning the Registrar not to pay out the proceeds; and then, the demand for freight was instituted on the part of the captors. On the former day, when this was stated, the Court reserved the cause for farther consideration on this part of the case.

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On this day. *Court.* — I am of opinion, that the cargo still remaining in the hands of the Court, is subject to the order of the Court, notwithstanding the decree of restitution which has passed. It was the intention of the Court, not being apprized of any farther demand, that the proceeds should be paid out, but that decree has not been carried into effect. I must observe, however, in reference to what has been done in this case, that when there is a decree of the Court for restitution, it is not to be obstructed by the mere caveat of the party. Notice should be given to the Court, whose duty it is to look to the prompt execution of its decrees. If there is any delay interposed, it should be notified to the Court.

[*Registrar.* — Parties enter their caveat, and warn me not to pay out the proceeds.]

*Court.* — I think the party has no absolute right to do that: He may enter it provisionally, and then come before the Court and state his reasons why the proceeds should not be paid out; but I cannot think that it is correct practice for the individuals to stop the payment absolutely, and as long as he pleases, without the authority of this Court, or of any other  
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Court which may legally interfere. It may be a fit subject for a general rule. At present, in this particular case, as the cargo is still in the hands of the Court, I am of opinion that it is subject to the order of the Court, and that the question is fit to be entertained.

(a) Lords, April  
23, 1784.

*On the particular question in this cause, Laurence then contended, —* That the contract of freight justly enured to the benefit of the captor, whenever the original contract of affreightment was fulfilled by the captor, and the neutral cargo was carried to its place of destination, under the same principle, and by the same rule of equity, by which the demand was not sustainable on the part of the captor, when the original voyage was interrupted. The case of the *Vreyheid* (a), before the Lords, was relied on, in which the captors were allowed freight, for a cargo of fish carried to *Leghorn*, its original port of destination.

*On the other side, the King's Advocate. —* Captors have no claim generally for freight on the neutral cargo restored. Claims of that sort can only be supported on the ground of some special service performed, by which the cargo may be supposed to have derived benefit. The carrying the cargo to the place of its destination is the common ground of such a claim; but it is not, in itself, alone sufficient to establish the demand, unless it is performed in such a manner as to render effectual service, by putting the claimant into possession of the property. In this case the capture took place — 1798. A claim was given for the cargo in 1799, when farther proof was directed to be made. From that time the claimant

was entitled to the possession. But the agents of the captors have detained the proceeds in their hands, till they were assigned to bring them into Court in *January 1801*. The cargo was undoubtedly carried to the place of its destination, but not for the benefit of the claimants, nor *delivered to their consignees*. It has been kept in the hands of the captors ever since. All benefit that might have been derived from an arrival at the port of destination, has been counteracted and frustrated by this conduct. On these grounds, the claimants apprehend they are not liable to pay freight to the captor.

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Sir *W. Scott*.—This is the case of a ship which had carried a cargo of corn to *Lisbon*, the original port of destination. In such a case I apprehend the rule to be, that the captor *is* entitled to freight, and on the same principle, on which he would be held *not to be* entitled, where he does *not* proceed, and perform the original voyage. The specific contract is performed in the one case, and not performed in the other. It is the rule of practice laid down in the case of the *Vreyheid*, a case perfectly within my recollection as a case very deliberately considered at the Cockpit. It is conformable to the text law, and the opinion of eminent Jurists.

“Quod additur de vecturæ pretiis solvendis, (says *Bynkershoek*)(a), ejus juris rationem non adsequor. Satis intelligo, qui navem hostilem occupant, etiam occupasse omne jus quod navi, five navarcho debebatur, ob merces translatas in portum destinatum. Proponitur autem, navem in ipso itinere fuisse captam. Eccur

(a) Q. J. P.  
1. ch. 13.

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(b) Lords, 23d  
April 1784.

igitur capienti solvam mercedes? Si qui cepit ~~navem~~, eam cum mercibus in locum destinatum perducere paratus sit, ejus juris rationem intelligerem, ceteroquin non intelligo (a)."

In the case of the *Vreyheid* (b), all the considerations that could be applied to this question were fully canvassed, and it was then recognised as the true rule, that the captor *who has performed* the contract of the vessel is, as a matter of right, and *de cursu*, entitled to freight; although, if he has done any thing to the injury of the property, or has been guilty of any misconduct, he may remain answerable for the effect of such misconduct, or injury, in the way of a set-off against him.

The case then is reduced to a question, whether the captor, in this instance, *has* done any thing to forfeit the right, which under the general rule he had acquired? He had made a capture, which is fully justified by the condemnation of the ship, and by the order for farther proof, as to the cargo. He carried the cargo to *Lisbon*, where the consignee was put into possession, though informally, and apparently without any shadow of right, by the hand of the *Portuguese* government. Such interference was however given, at the suit of the consignee of the cargo, and by these means that consignee obtained possession of it. Being a cargo of corn, it was necessary that it should be sold. The sale was entrusted to Mr. *Panton*, by the agreement of both parties, and under a condition, as it is stated, that the proceeds should remain in his hands

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(a) *Bynkershoek* is, in this passage, discussing the propriety of the regulation of the Consolato, c. 273. See *Colleganea Maritima*, section 6, 7, 8, of the 273d chap.

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till a sentence of final adjudication could be obtained. This gentleman is, therefore, to be taken as the common depositary of both parties. When it is said, that the captor did not bring in the proceeds, so soon as was required of him, we must consider whether it was in his power. The proceeds were left in the hands of this house at *Lisbon*, with the consent of the consignee, and they have not been transmitted. So that what has been brought in, at last, is an advance, made out of the private funds of the captor. If there has been any error in these proceedings, it has been the common error of both parties. Under the circumstances of this case, I am of opinion, that the captor has not forfeited the interest which he had acquired.

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Freight decreed to the captor.

## THE COUNTESS OF LAUDERDALE.

July 9th,  
1802.

(Instance Court.)

THIS was a case in which a warrant had been extracted against this vessel, in the Instance Court of Admiralty, by the original *British* owner, on a suggestion that she had been a *British* ship, taken by the *French*. It appeared that there had been a condemnation of the vessel, in a *French* port; that she had been sold to a neutral purchaser, and by him transferred to the present holder, a *British* merchant.

A British prize ship carried into the port of an enemy.—*Presumption* from that circumstance.—*Proceedings* on the part of the original owner, on seizure by the process of the civil Court of Admiralty, must be sustained by proof, on his part. Further proof not demandable against the neutral possessor, as in cases of prize, where the onus probandi lies on him.

On

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COUNTS  
OF  
LAUDERDALE.

July 9th,  
1802.

*On the part of the Captors, the King's Advocate* declined to argue on the fact, that the ship was lying in the enemy's port, when sold by the asserted neutral purchaser, to the subsequent *British* purchaser; observing that *in other cases (a)* the Court had held, that such a circumstance alone would not vitiate the effect of a *bona fide* sale, although it afforded great opportunities of collusion, to screen and protect direct sales, between the enemy and the *British* merchant. He contended, however, that the double transfer which had taken place of this vessel, whilst lying in the port of the enemy, afforded ground of suspicion that the purchase had been made collusively in the

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(a) In the case of the *Samuel*, July 1, 1802. The ship, taken originally by the *French*, and condemned at *Ostend* in 1797, was asserted to have been sold to *Strobel* and *Martini*, and by them, to *Gilchrist* a neutral merchant of —, and by *Gilchrist* to *Collett* and *Thomas* of *Dover*, the former owners, whilst lying in the port of *France*. On the argument, objecting to the proof of transfer, and also to the legality of such a purchase, made by a *British* subject, *The Court*.—I certainly shall not rest on this evidence; but it would be impossible to condemn, unless I accede to the proposition, that a *British* subject may not purchase of a neutral, a ship lying in the enemy's port. On the principle of law, I hold it to be clear, that if a neutral merchant has a ship or goods lying in the port of an enemy of this country, he is at liberty to dispose of them, even to a *British* subject. If an *English* subject employs a neutral to purchase for him in the country of the enemy, the neutral is, in such a case, *but the mere agent*: The goods then must be considered to pass immediately from the enemy to the *British* subject; and such a transaction would be illegal. But if a neutral merchant has *bona fide* purchased for himself a vessel, lying in the port of a belligerent, he may dispose of her as freely as if she was on the seas. The locality of the ship will not affect the legality of the sale.

first

first instance for the *British* merchant, by the asserted neutral *purchaser*, acting only as the agent; in which case the purchase would be illegal. It was prayed therefore that the holder might be compelled to prove the fairness of the transaction, by exhibiting his correspondence in the same manner as would be required in a case of prize.

The  
COUNTRESS  
OF  
LAUDERDALE.

July 9th,  
1802.

*On the other side, Laurence and Swabey contended,—* That there was sufficient evidence on board, in the sentence of condemnation, and the bill of sale; that beyond these ordinary documents of property, the seizer had no right to demand the proof of correspondence in a civil suit.

## JUDGMENT.

Sir *W. Scott*.—In this case the vessel has been arrested in the Instance Court, at the suit of the former owner. It is admitted that he was the former proprietor, but not farther: It is not admitted that he has any present property in this vessel. On the other side, it is admitted that the vessel was captured, and carried *into a port of the enemy*, by which act duly pursued, the best title in the world might be extinguished, and by which a strong ground of presumption is laid, that the right of the former proprietor has, in fact, been legally divested, in a regular and effective manner (a), for the presumption is, that being so carried, the vessel was subjected to a legal condemnation.

Under

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(a) Note the difference between a ship carried into an enemy's port, and into a neutral port. In the old case of the *Constant Mary*,

THE  
COUNTS  
OF  
BADDENDALE.

July 9th,  
1804.

Under these circumstances, I think the former proprietor is not at liberty to take on himself the character of owner, until he can prove his title has not been legally divested. He does undertake in his allegation, to aver, that, notwithstanding the presumption founded on this fact, the title has not been *bona fide* conveyed; and this he is called upon to prove. But when the case comes to proof, he says, No, I will call upon the other side, to make out every step of the purchase, and the onus lies with him.—Certainly it *does not*, under such circumstances, but if it *did*, there is a bill of sale on board, and a sentence of condemnation in the Prize Court of *France*—proof sufficient to establish a good title in all ordinary cases, even of prize. It would, I think, be going beyond the bounds which *this* Instance Court of Admiralty *has hitherto* prescribed to its practice, to call on the claimant to support the *prima facie* evidence of a good title, which is already exhibited.

In the Prize Court, where special reasons for deception are perpetually occurring, and where the Court exercises a much more unconfined jurisdiction on questions of property, than it exercises in its civil forum, the course may be otherwise; there the proof of property lies generally upon the claimant. The claimant here exhibits documents which would satisfy even that demand.

Warrant superseded.

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cited 3 Adm. Rep. p. 97. where a vessel taken as prize was carried into *Bergen*, and there sold. The former proprietor alleged his title, and averred that the vessel had not been legally transferred. The claimant, a foreign purchaser, was called upon to make out the proof of transfer, and legal condemnation.

## THE NEW DRAPER, WALKER Master.

July 20th,  
1802.

(Instance Court.)

THIS was a cause of possession, instituted on the part of *Crauford, Whately*, and others, composing the majority of owners, against *Walker*, a part owner of 7-16ths, and also master of the vessel. It appeared that the property of the vessel was divided in the following manner: 7-16ths were held by several persons in *Dublin*, the master was the owner of 7-16ths, and the remaining 2-16ths were held by persons in *London*.

Case of possession.—Master dispossessed at the application of a majority of interests.

*On the part of the Master, the King's Advocate and Adams.*—The Court would not interfere to disturb the possession, unless on the application of a clear majority of interests. As the shares originally stood, the master had so great a preponderance, that if the owner of 1-16th joined with him, it would create an equality of interests. In the present case, it appears that a sale of the other 7-16ths has been made to the master, by which he is in effect the holder of 7-8ths. The bill of sale has not, indeed, been executed, but the master has paid his money under the contract. The Court would not interfere, therefore, to dispossess a master standing in this situation. But, if the master is not taken to be the holder of a majority of interest, in his own person, there is no evidence before the Court to shew that the suit was brought by such consent of the other part owners, as will constitute a majority against him. The affidavit, which has been made by Mr. *Crauford*, states that he came over from *Ireland* to



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arrest the ship, and that he is authorized to act for the *Dublin* owners; but it does not specify that he is invested with a power of attorney to institute a suit against this ship on their behalf, but only, that he is empowered to act for them generally. There is before the Court an affidavit of Mr. *Oldham*, the person acting as agent of the *Dublin* owners, in the agreement to transfer their shares to *Walker*, in which he states, "that he had been in *Dublin*, and had seen Mr. *Prentice*, who declared to him, that his house of trade was willing to execute the agreement, and that they had not authorized *Crauford*, or any other person, to arrest the ship." By the dissent which this person has expressed, it is evident that the parties in the suit do not compose a majority of interests.

*On the other side, Laurence and Swabey.*—Mr. *Crauford* is a part owner who has sought the aid of the Court to dispossess the master, on an affidavit stating his own share, and that he is authorized to act for the *Dublin* owners, who are desirous to concur with him, to appoint another master, because they cannot get this master to settle his accounts. Mr. *Whately* joins in this affidavit, and states himself to act for his own house, and the house of *Quintin Dick* and Co. so that all the part owners are joining in this suit against the master. No objection was made to the authority, under which these gentlemen appeared in the first instance. The parties might have called for a proxy, if they had thought proper; having declined to take that precaution,

caution, they are not at liberty to come forward now, and deny the sufficiency of his authority, in opposition to the affidavit, in which it is averred, that all the *Dublin* owners, and also the *London* owners, concur in this suit. Taking the suit to be properly instituted, what is there to defeat the operation of it? The master endeavours to set up a virtual title to a majority of interest, on the ground of an agreement entered into between him and the agent of the persons in *Ireland*. It is admitted, no bill of sale has been executed, but it is said, some of the parties are ready to execute it. It is impossible to sustain any such inchoate title, in opposition to the stat. 34 G. III. ch. 68. § 14. which expressly declares, that "no contract or agreement shall be of any avail, for any purpose whatever, unless a bill of sale is executed." There have been several instances in which the Courts of Law have had occasion to consider the effect of these words. In *Hibbert v. Rolleston*, 3 *Brown's Rep.* in which the agreement was specific and incontrovertible, and in which the papers were deposited, but no bill of sale executed, it was held, that although the Court of Equity might have given relief, by ordering such an agreement to be carried into effect, if the act of parliament had not been in the way; yet, considering the precise words, and the purport of the act, the Court of Equity could not compel an execution of this agreement (a).

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(a) See also *Mosi v. Charnock*, 2 East's Rep. p. 399. with respect to the interpretation of that act. s. 16.

JUDGMENT.

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## JUDGMENT.

Sir *W. Scott*.—This is a proceeding for the purpose of dispossessing a master, and part owner of a ship, which has been under his command. The dispossession of a master is in its nature, not an uncommon proceeding; all that the Court requires, in cases where the master is not an owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master, and part owner, something more is required before the Court will proceed to dispossess a person, who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It is not however, by any means unprecedented for this Court to proceed even to that extent; but then some special reason is commonly stated to induce the Court to interpose. I observe, there is a reason given in this case, and the same that most frequently occurs, “that the master is irregular in his accounts with his owners.” The interests, on behalf of which the suit is stated to be brought, are 9-16ths of the whole property—no large preponderancy undoubtedly, but such as, great or small, is sufficient to warrant a proceeding of this nature. The cause has been entered, and has gone on upon affidavits; no proxy was called for, which would have been the natural and simple practice: no authority of that kind is required to be produced, nor any suggestion made, that the person instituting this suit is not properly authorized, till the case is ripe for hearing. I must, therefore, take it as granted on the other side, that the *Dublin* owners are consentient

tient to this action; as to loose conversations, which are stated to have passed between the parties and Mr. *Oldham*, under equivocal circumstances, I cannot hold them sufficient to defeat the consent by which this suit has proceeded so long.

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It is offered as a reason, to dissuade the Court from interfering to dispossess this master, that it would be an act of great hardship and injustice towards the master, if he should be dispossessed, after he has actually purchased the shares of the *Dublin* owners of *Oldham*, and has paid him the money for them. The letter, under which *Oldham* is supposed to have sold, is not exhibited, which is no inconsiderable defect. By that, the Court might have seen what authority was conveyed to *Oldham* to sell their shares. Instead of the original instrument, nothing is brought forward but a description of it in a letter, which is not properly represented, when it is said to be *an authority to sell their shares*, the words being, I observe, “to sell the ship, as we wish to act in conjunction with the *London* owners, &c.”

Independent of any other objection, I do not think that under the act of parliament, it would be possible for this Court to recognize such a transaction as this; for the words of the act are as strong as they can be, “That no contract or agreement shall be of any avail for any purpose whatever, either in law or equity, unless such transfer, contract, or agreement shall be made by bill of sale or instrument in writing containing the recital prescribed, by the said act.” It has been observed in argument, respecting the power which *Oldham* had to sell, that if he had possessed a special power of attorney for that purpose, he

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he might have executed a bill of sale; and that from his not having done so, a presumption arises, that he had not a sufficient specific power, but only a general power, enabling him to collect debts, and do other ordinary acts.

*King's Advocate.*—I fear I have been misunderstood. The question which I meant to submit, on the part of the master, was, whether, the master having paid his money under a contract with *Oldham*, the agent of the *Dublin* owners, the Court would not decline to interfere to dispossess him.

*Court.*—It is not shewn to me that there was any power to *Oldham* to sell. If the parties will not produce that authority, I shall not construe it otherwise than it is represented on the other side, a *conditional power*. However that may be, whether it was a general power, or a conditional power to sell in conjunction with the *London* owners only, I am of opinion that it is impossible for the Court to recognize this agreement.

The case becomes, therefore, a common case of the majority of owners, proceeding against one, in which the common rule of this Court must be pursued.

Possession decreed.

THE MARTIN OF NORFOLK, M'CROHAN  
Master.

July 27th,  
1802.

(Instance Court.)

THIS was a case of possession, respecting an *American* ship, submitted to the High Court of Admiralty by the consent of the litigant parties, being *American* subjects. It was a suit, instituted, on the part of *Williams*, the former owner, against the former master, *Parcell*, now become owner, under a decree of sale passed against the ship, in the Admiralty Court of *St. Sebastian*, at the suit of some creditors proceeding against her. An act on petition was entered into between the parties, stating the several grounds of fact and law, on which they relied.

*Sale* under a sentence of the civil Court of Admiralty at *St. Sebastian* not to be called in question in the civil Court of Admiralty of this Country—Warrant superseded.

On the part of Mr. *Williams* it was alledged, that he purchased the ship 20th *January* 1800, in *America*, for eighteen thousand dollars, and that she was worth at the time of her departure, after repairs done, &c. twenty-six thousand dollars; that she sailed, 5th *February* with a cargo on his account, worth thirty thousand pounds, for *Lisbon* and the *Mediterranean*, and was taken on the 25th *February* 1800, by a *French* privateer, and carried into *St. Sebastian*; that before the departure of the ship, he had settled all demands with the master, and paid an advance of a month's wages, which was more than was due at the time of capture, and that the whole of the crew were discharged on their arrival at *St. Sebastian*. It then stated, that the ship was captured and carried into *St. Sebastian* by a *French* cruizer; that whilst Mr.

*Williams*

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*Williams* was absent in *Paris*, prosecuting his claim, and superintending an appeal, till the final sentence of dismissal in *September* 1801, the sale in question was made, under a decree of the Court of *St. Sebastian*; and whilst the ship and cargo were in possession, and wholly under the controul of the Court of Prize in *Paris*, and that, on that account, the proceedings under the authority of the Tribunal of Commerce at *St. Sebastian* were null and void. That the sale was made solely to answer the demands of *Parcels*, the master, and not of others; and that it is not competent to any foreign Court of Admiralty, under the maritime law of nations, to decide upon accounts between an owner and his master. It further alleged, that *Parcels* obtained the said decree through fraud and imposition, under a pretence of a demand for wages, and other charges, which had before been settled between his owner and him. That moreover the cargo in the hands of the master, was sufficient to have answered all demands, without proceeding to a sale of the ship. That the sale was collusively transacted at an inferior price of 6500 dollars. That the subsequent transfer to *Reilly*, as agent for *Lynch*, was a collusive transfer, without orders from *Lynch*, and on which no money had been paid, &c.

On the part of the present holder of this vessel, she *aff* detailed several circumstances that had taken place, and denied that the proceedings in the Court of *St. Sebastian* had been instituted on the part of the master. It then stated that the ship and cargo were arrested by process of that Court at the suit of the attorney of Messrs. *Sewartz* and Co. of *Leghorn*; that  
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afterwards, in the months of *April, May, and June*, proceedings were interposed against the ship and cargo by five other parties, claiming money due to them from Mr. *Williams*, as advanced to and for him, to enable him to prosecute his claim at *Paris*; that at that time a claim was made by the master for monies paid to the mariners on their discharge, &c.; that the Court held the claim of *Sewartz* not to attach, but pronounced for the demands of the other parties, and decreed the cargo, and ultimately the ship, to be sold at public auction; that it was so sold by public auction on the 20th *June 1801*, after an appraisement under the direction of the said Court; that the master's account was so far from being unjust, that C——, to whom *Williams* had sold the vessel conditionally at *Paris*, and who came to *St. Sebastian* to obtain possession, admitted the same to be true, and offered to discharge it, if the master would procure a delivery of the ship to him, which it was not in his power to effect, as it was then under the custody and controul of the Court of *St. Sebastian*. These were the principal facts, on which it was contended on the part of the present holder, that the title was good under the authority of a decree of a competent Court, and that the Court of Admiralty of this kingdom would not interpose to disturb a title, held under the decree of a competent foreign Court.

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*On the part of Mr. Williams, the King's Advocate contended,*—That it was a monstrous proceeding to allow a foreign ship of great value to be impleaded, and sold in a foreign Court, without notice to the owner; that it was an assumption of power, unwarranted



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ranted by the general maritime law, and most alarming to commerce; that it was of the utmost importance to all countries to hold, that the tribunals of *Spain* have not a right to take cognizance of disputes between foreigners, so as to strip the owner of his ship, and of such valuable property, without resorting even to the resident minister of *America* at that Court; that in a case, in which such evident collusion appeared, where a vessel, worth 26,000 dollars, was sold for 6500 dollars, and sold afterwards again, within a month, for 12,000 dollars, the Court would not decline to interpose and investigate the course of the transaction; that if the Court did not at present possess sufficient proof of the averments, to enable it to come to a final conclusion on the merits between the parties, there was at least enough before the Court to throw the burthen of proof on those claiming under so strange, so irregular, and suspicious a title.

#### JUDGMENT.

Sir *W. Scott*.—This is a question, arising on a sale, which has been made of an *American* vessel, to the master, appearing as purchaser under a decree of the *Spanish* Court of Admiralty of *St. Sebastian*. The suit commenced by a *warrant* of arrest against the ship, calling on the former and present master in special, and on all other persons in general, to shew cause why he should not be dispossessed of the ship, and why the possession should not be restored to *Williams*, the former proprietor. On the original affidavit, there was no reason to suppose that any question

question of property would be raised : It appeared to be a mere question of possession, and as such, coming accompanied with a letter from the *American* minister, stating that the parties were *Americans*, and were desirous of submitting the case to the judgment of this Court, the Court was induced to entertain the suit. Without such an application from the foreign minister, and without such consent of parties, It would by no means have been disposed to interfere in the disputes of foreigners ; and even now It entertains the cause with reluctance, and merely to prevent farther inconvenience and loss by resort to the decisions of other Courts in other countries. On the return of the warrant, it appears, that the case is entirely a question of property.—In respect to the disputes of *British* subjects, the jurisdiction of this Court, as to questions of property, is extremely limited. It interposes to transfer possession, when no direct question of property is involved ; but direct questions of property have been long withdrawn to other jurisdictions. On these considerations, perhaps, if the Court had been duly apprised of the whole extent of the case, It would not have suffered the warrant to issue.

It now turns out, besides, that there is not only this question of property, and between foreigners, but that it is founded on the acts of a Court of Admiralty in *Spain* ; so that there are as many obstacles to the jurisdiction of this Court, as can well be conceived to exist in any one case. The parties are foreigners—There is a title of property concerned—and the act of a foreign Court, not being the country of the litigants, is brought into dispute.

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dispute. It is contended, however, in the act of Court which has been entered into between the parties, that all that has been done there is a mere nullity, and that this Court is bound to interpose, to annul the effect of the sentence of the foreign Court—and on these grounds: first, Because the Court of *Spain* had no jurisdiction, inasmuch as the title to the vessel was at that time dependant on a sentence of a Court of Prize of another country—It is denied indeed that any proceedings of prize were going on against this ship in the Court of *Paris*. It appears however that the vessel, being an *American* vessel, had been captured by a *French* cruizer, and sent to *St. Sebastian*; and that before the proceedings commenced in *Spain*, there had been a sentence of restitution in the Court of *France*. How far that decree was carried into execution by a delivery of possession, is left in some degree of obscurity (*a*). Certain it is, that Mr. *Williams*, in his first affidavit, states, “that the papers were given up to him after the sentence of restitution;” and I think there is reason to suppose that he was actually put into possession. The *French* captors appealed from the sentence of restitution, and Mr. *Williams* continued in *France*. It cannot be supposed, that, if the restitu-

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(a) The evidence produced on different sides contained rather an intricate statement of facts, and gave a contradictory representation of the time when Mr. *Williams* was supposed to have regained possession of his ship, under the decree of the Prize Court of *France*.

tion *had not* been carried into effect, the *French* captors would have omitted to maintain their interest in the possession, and to resist these proceedings that were going on in *Spain*. Nothing of that sort appears: The suit goes on, regularly, as between the merchant instituting the civil suit, and the vessel, from which it is reasonably to be inferred, that she had been given up, the *French* captors acquiescing in the delivery. I cannot therefore, on this ground, presume, that the *Spanish* Court of Admiralty proceeded without competent jurisdiction. It would be infinitely too much for me to infer, that, because there had been some proceedings in *France*, the subject-matter was so far out of the power of the Court of *St. Sebastian*, as to render all the proceedings there null. Unless I could do this on most indubitable grounds, I think I am bound to conclude, that the sentence was not pronounced without competent authority.

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The second ground of objection stated in the Act is, *the asserted incompetency of the Spanish Court to take an account between the master and owner*. I know that from municipal regulations, the Court of Admiralty of this country does not entertain suits for any such direct purpose. But am I to presume from thence that the *Spanish* Court of Admiralty is not competent to do so, especially when I see *that it has* actually entertained a suit in these matters? It is further objected, that the *Spanish* Court proceeded to entertain this suit without application from the *American* minister. Such a precaution is undoubtedly very proper to be observed; but I do not know that it is a matter of



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necessary obligation. Suppose even that it was a principle of universal law, that such preliminary caution should be observed, what have I to satisfy me that such an application was not made? Supposing it to be an expectation reasonably to be entertained on the part of *America*, it will be too much for me to interpose, and say, that the law of nations is so violated by the omission, as to render all proceedings without that ceremony null and void. If there is any objection to be taken on this ground, it must be left to be enforced as a matter of representation between the two countries.

The third ground, on which the sentence is impeached is, the charge of collusion and fraud. The circumstances of the case are relied on, as sufficient to shew, that there was a conspiracy between the master and the other parties to defraud the owner of his vessel. If such a fraudulent conspiracy existed at all, it must have subsisted between a great number of persons; and, I fear, I could not pronounce the fraud alledged to have been practised, without involving in that guilt the Court, whose sentence I am desired to annul. What is there to convince me that there has been any such fraudulent association. It appears, that proceedings were first instituted against the ship in the Court of *St. Sebastian*, on the part of a foreign merchant of *Leghorn*. *Mr. Williams* was absent at *Paris*. The master was at first the defendant, and I must suppose with the confidence of *Mr. Williams*, and under a perfect reliance in his integrity. There is no averment that *Mr. Williams* was ignorant of what was going on; whilst the suit

was

was depending, the master intervened for a demand of his own against the ship, and at a time, when I think it is clearly proved, that Mr. *Williams* had notice of his claims, and knew that the master was disposed to maintain them in an adverse manner, in conjunction with the various other claims, which were put into a course of litigation before the *Spanish* Court. He was aware, I say, that the master was disposed to maintain an adverse possession, because it appears that Mr. *C*—— had gone from *Paris* to *St. Sebastian*, and returned to *Paris* with notice to *Williams*, that the master refused to deliver up the possession to him. What does *Williams* do, knowing that the master was no longer to be relied on as his agent, but that he was maintaining an hostile possession against him? What might be expected of him after this information, is, that he would have appointed another agent to maintain his interest against this master, who was now standing in direct opposition to him. But nothing of that kind is done. After refusal to deliver up the ship, and notice given of his demand, the master formally intervenes.

If the Court of *Spain* was in any manner imposed upon, redress should have been sought by appeal to the appellate Jurisdiction of that country, which had a power to remedy any errors, or even injustice, that had been committed in the first instance. Heavy indeed would be the task imposed on this Court, were it to undertake to rectify all the errors that parties may be disposed to impute to foreign jurisdictions. Can it be thought that this Court would set itself up as an universal Court of Appeal to foreign tribunals?

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Every nation has its own Courts of Appeal, and if any fraud had been committed, Mr. *Williams* should have used his diligence, in applying to those Courts in *Spain*. Care enough appears to have been taken to secure his remedy ; for it appears that on every payment that was made, under the decree of the Court, security was taken to answer any objection, that might be made against the sufficiency of the proceedings of the Court of Admiralty at *St. Sebastian*.

On all these grounds, I am of opinion, that the parties applying to this Court for redress, have missed their way ; and I shall decree the warrant that has issued against the ship to be superseded, and the parties to be dismissed.

Nov. 4th,  
1802.

THE HAABET, HONORST Master.

*Demand, against the-captor to pay the value of a cargo restored on farther proof, and also to pay freight, rejected,—beyond the amount of the proceeds of the cargo—Proceeds decreed to the neutral master for freight.*

THIS was a case of a *Danish* ship, captured the 15th *August* 1800, with a cargo of salt, wine, brandy, and cloathing, on a voyage from a *French* port to *North Bergen*. The ship had been restored by consent, 8th *Sept.* 1800, with freight, decreed to be a charge on the cargo, which was also restored on a subsequent day. The proceeds being insufficient to pay the freight, application was now made on the part of the several claimants of the ship and cargo, that the captor might be decreed to pay the balance of

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of freight to the ship, and also to account for the value of the cargo to the proprietor.

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*On the part of the captor, the King's Advocate.*—

It is required in this case that the captor shall account to the claimant of the ship for the freight, and also that he should refund the value of the cargo to the proprietor; that is, in effect, that he should be condemned in costs and damages, for a seizure which was perfectly justifiable, and on which restitution has taken place on the original evidence, only on account of the small value of the property. It was a cargo laden in the enemy's ports, unaccompanied by any bill of lading, and not claimed in this Court till nearly a year after the capture. Under such circumstances a demand of this kind is wholly unsustainable.

### JUDGMENT.

Sir W. Scott. — This was a *Danish* vessel, taken on a voyage from a *French* port to *North Bergen*, laden with salt and other articles. It has happened, that since the restitution of the vessel, she has sustained some injury by the embargo which was imposed on all *Danish* ships. The ship was, however, at last liberated, and went away with a decree for freight and expences to be a charge on the cargo; but the Court did not in any manner determine that a burthen was to be thrown on the captor. It was supposed that the cargo would be sufficient; though unfortunately the event has proved otherwise. Greater expences may probably have been incurred on account of the embargo: However that may be, I am of opinion that the Court cannot do more than



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carry into effect the decree which has been made, by ordering the proceeds to be paid to the neutral master (a). If he has any further demands, they must be prosecuted against the consignee.

Nov. 23d,  
1802.

### THE PEGGY, FINLAY Master.

(Instance Court.)

Case of possession — Possession not disturbed — Ship left in the hands of the person in possession, on bail being given for the value of the ship — Demand for bail for intermediate earnings rejected.

**T**his was a case of possession on the part of the original owners. It appeared that the vessel was a *British* ship which had been captured by the *Spaniards*, and re-taken, and carried to *Jamaica*, where the ship was sold to pay the salvage.

On the part of the original owners it was contended, that the asserted sales were not valid, inasmuch as they had not been made by the order of any Court, and that the transfer had not passed in conformity to the Registering Act; and farther, that the vessel had

(a) In the case of the *Vrouw Margaretha*, 26 Feb. 1802, where the cargo being of a perishable nature, had become insufficient to pay the freight, the Court said that it must be understood in future, that under particular circumstances, application might be made to the Court, on the restitution of the ship with freight, to decree the sale of so much of the cargo as might be necessary to be sold for the discharge of freight. — An application of this kind had been made and granted on a former occasion, in the *Clarissa*, 28th December, 1799.

been

been bought by A. B. by the order of the master, and on account of the original proprietors.

The  
Proc.

Nov. 23d,  
1802.

On the other side it was insisted, that the purchase was not made for their account.

After some discussion the Court said, The facts that are asserted on either side to have passed at *Jamaica*, are not laid before the Court with sufficient certainty to enable it to form a judgment upon them. In the obscure state in which the matter is left, I shall not venture to disturb the possession, neither shall I suffer the ship to lie under the custody of the Court, till it becomes a prey to the worms. What I shall do will be to deliver out the vessel on bail to the party found in possession, that it may await the farther hearing of this cause.

*On motion that the bail might justify, Swabey observed,* That the course of practice would be, that the bail should in the first instance be produced to the Marshal, that they might be reported by him.

*On a subsequent day, 14th December 1802, the King's Advocate moved the Court* — That bail might be given, not only for the value of the ship, but for the amount of her earnings in the intermediate time.

*Swabey contra.* — This is an application for special bail on very unreasonable grounds. — *Riley* was found in possession of the ship, and the Court declined to disturb that possession. Actions of this kind were not

The  
Prayer.

No. 23d  
1802.

not originally of a bailable nature, but under the direction of the Court they have become so, for the benefit of all parties interested in the event of the suit. The bail that is to be taken, however, can be only for the amount of the value of the thing, on which alone the right of action *in rem* had accrued. The effect of the application now made would be, that Mr. *Riley* should fit out the ship, and procure the freight, and then pay over the profits of his own exertions to the other party. In the case of part owners, the bail is given only for the return of the vessel, and in all other cases of disputed possession, common bail is all that has been demanded.

#### JUDGMENT.

Sir *W. Scott*.—This case arises on a special application to the Court, to deliver on bail, a ship which has been arrested in a cause of possession. It is but recently that the Court has acceded to a prayer of this nature; but in consequence of the representations which have been made, in numerous instances, of the damages sustained by ships lying for any length of time in harbour, the Court has been induced to let them go, on bail being substituted in the place of the ship itself, to answer the demand set up in the cause of possession. In the present case, the Court directed the ship to be delivered on bail to the person in whose hands it was found—no proof having been produced on which the Court could think itself entitled to disturb his possession.

Is there any inconvenience sustained by the other party from this proceeding? I see none; on the contrary,

trary, there is a fund provided to answer his demand, which is not liable to deterioration. If this method had not been pursued, the ship must have been left in the custody of the Marshal, at a heavy expence, without any accruing profits, and at an increasing diminution of value. The Court has, therefore, in acceding so far, done what seemed best for the purposes of justice, and for the ultimate advantage of the parties: Was it to go farther, and demand bail *for any earnings* that might be made, a consequence may be foreseen which the Court is on every ground disposed to avoid, that it must eventually be led into discussions of intricate and contested causes relative to such earnings, which it could not conveniently adjust. It will be more for the convenience of parties, to have questions of that kind left open to some other course of inquiry. I shall adhere to the former practice, which has hitherto considered the bail as a substitution for the substance of the ship.

Bail decreed to be taken for the value of the ship.

The  
Peer.

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Nov. 23<sup>d</sup>,  
1802.

Dec. 11th,  
1801.

THE JACK PARK, LITTLE Master.

(Instance Court.)

Wages of a  
mariner, pressed  
into the King's  
service — De-  
mand of *whole*  
wages, on a sug-  
gestion that the  
master had pro-  
cured him to be  
impressed — re-  
jected, for de-  
fect of proof.

THIS was a case of a demand against the master, for wages on the part of a mariner, from the time of entering on board the vessel at *Liverpool*, November 1798, to the arrival of the ship in *Liverpool*, October 1799.

On the part of the mariner a libel had been given in, pleading the hiring and service to the time of the ship's arrival at *Jamaica*; and farther, that on the voyage from *Africa* to the *West Indies*, the master began "to use the crew with cruelty, keeping "them short of their allowance of water; and that "on the ——— day of ———, a lieutenant of His "Majesty's ship the *Acasta* came on board, and "pressed thirteen of the men, but refused this man, "on account of the ill state of his health; that never- "theless, on the succeeding day, the boat of His "Majesty's ship the *Aquilon* coming along-side, "the mate, on that occasion, did, by the desire of "the master, refuse permission to this mariner and "others to go down below, for the purpose of secret- "ing themselves; that the hatches were shut down, "and the crew were all kept on deck; that the "lieutenant of the said ship, on coming on board, "held some private conference with the master, and "did, *by his solicitation and procurement*, impress this "mariner, notwithstanding the said lieutenant was  
"apprized

“ apprized by him of the ill state of his health, and  
 “ the infirm condition of his legs owing to the scurvy,  
 “ &c.” On the suggestion that the master had procured this mariner to be impressed, wages were demanded for the whole voyage up to the arrival of the ship in *Liverpool*, notwithstanding the mariner had not actually served on board the vessel on her returned voyage.

The  
 JACK PARR.  
 Dec. 11th,  
 1802.

*In objection to several parts of this libel, Swabey.* — This suit is brought against the master, and not against the owner. Undoubtedly the mariner has a right to make his option, but the Court will take care that a suit so brought shall be specific in its demands, and that it shall not branch out into an *action* of another nature, *that of damage*, which is a plenary action, and though one which this Court is competent to entertain, it is not of so favoured a nature as the suit for the recovery of wages. The libel contains one article respecting ill-treatment, which is peculiar to cases of damage, and which cannot properly be introduced into a cause of this description, unless to justify desertion on the part of the mariner, or to account for something arising incidentally out of the principal case.

Another article pleads “ the impressing of this mariner,” with a view of obviating the objection arising from the defect of personal service. If this can have any weight, it must be shewn to have been procured by the *malicious contrivance* of the master. What is said on this point with respect to the first ship’s boat that came on board, is only, that the mate said this man was fit to serve on board a King’s ship. On the second day, when the impressing of this man took

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1802.

took place, it is pleaded that it *was done by the solicitation and procurement of the master*. But no fact is alleged on which any charge of procurement can be founded—there was a conference between the lieutenant and the master, and that is all.—If the officer of a King's ship thinks proper to impress a mariner on board a merchant vessel, it is an exercise of his power with which the master has no right to interfere.—By the schedule annexed it will appear, that the wife of this man has received some payments: If any wages are due, it can only be for the time in which he was in the service of the vessel, up to the time of his being impressed. The schedule besides contains a charge of two guineas for crimpage, a charge never introduced into a suit for wages.

*On the other side, the King's Advocate*—Argued against the representation of facts relied on, upon the other side, and contended that some wages were at least admitted to be due—That the contract was for a voyage out and home, that if the Court should be of opinion that the man had been prevented from executing his part of the contract by the act of the master, it would entitle him to the *whole* of his wages.

#### JUDGMENT.

Sir *Wm. Scott*.—This is an action brought for the recovery of wages, on a voyage from *Liverpool* to the coast of *Africa*, and from thence to the *West Indies*, and back to *Liverpool*. It is brought against the master and not improperly: For the wages of mariners

riners the master is liable, the ship is liable, and the owner is liable: The mariner is entitled to his option, and in some respects, perhaps, there is less inconvenience occasioned by proceeding against the master, because in that case the ship is not detained. It seems that the contract has not been fulfilled, but that the mariner was impressed into the King's service. *Prima facie*, therefore, he will not be entitled; but if he takes upon himself to show, that it was by the malicious act of the master, or of those who may be supposed to have acted under the authority of the master, that he was so impressed, and thereby prevented from completing his engagement, he may entitle himself to recover his wages to the whole amount (a). He has taken upon himself to make this allegation; and the question now before the Court, is, whether the facts here stated are sufficient to support the charge.

The libel pleads, "that the master and mate began, from a certain time, to ill treat him, and the rest of the crew, by which this mariner became affected in his health." It does not appear to me how this general ill-treatment, if proved, can affect this particular case; on the contrary, it rather rebuts the imputation of particular malice exercised against this person. However disposed the Court might be to entertain the charge of particular malice, this general matter might only lead to a great deal of unnecessary evidence. It has been observed in argument, that this charge of ill-treatment is altogether a charge peculiar to a cause of damage.—It

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JACK PARK.

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(a) An allegation to this effect was admitted in the case of the *Grange*, June 20, 1801.



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is certainly a charge proper for an action of damage; but it might, nevertheless, be not improper in a suit of this kind, as historically accounting for a fact afterwards relied on; and on that ground it might be not unfit to be admitted *here*, though the Court is *not* insensible of the danger of mixing suits very different in their substance, as well as in the manner of conducting them.

The circumstances that took place when the boats came on board are next pleaded. The boat of the *Acasta* comes on board; the mate says, "that his crew were ill of the scurvy, and that this man was the most fit for service." The officer, however, did not think so; he left this man, and took others. Suppose this fact to be proved, it would not, I think, go much further than to shew a difference of opinion between the mate of this vessel (who is not the person sued in this case) and the King's officer on this impress service, as to the comparative fitness of the persons to be taken into the King's employ.—It must not be represented as an act of malice, that the mate informed the officer that he was more fit than others, unless it can be shewn that he was evidently more unfit; which can hardly be presumed, consistently with this allegation, which imputes a general state of disorder to the whole crew, or consistently with the facts that follow. For we find that he is a person elected in preference to others by the next King's boat that comes on board. With respect to what passed with this second boat, it is a very singular charge upon the master, that the mariners desiring to secrete themselves, he positively refused permission, and compelled them all to appear  
on

on deck. Surely this cannot, in any view of it, be deemed an act of special malice against any individual, and as little can it be justly deemed an act of general oppression, for in such an act the master did not outrun his public duty. There have been cases, if my recollection does not mislead me, in which masters have been articleed against, in this Court, for secreting their mariners in fraud of the public service. It is a strange crimination to find its way into such a proceeding as the present, that the master did that, which this Court must have held him censurable from abstaining to do; masters must understand, that they have no right to lend their mariners any such fraudulent protection.

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The allegation proceeds to impute in general terms, "procurement or solicitation," but without charging any one specific act. As to the charge of "connivance" which is added, I have only to observe, that it seems perfectly unintelligible. For what is the connivance of a person, who is legally bound neither to resist nor elude a just exercise of authority? If indeed a case could be stated in which a master recommended, against his own better knowledge, a person whom he himself knew to be evidently unfit, it might be deemed an act of malice. But here no such charge is specifically brought: The master orders all his men on deck, as it was his duty to do — The King's officer makes his election, and having fixed upon this man, and heard from himself the statement of his infirmities, after all decides his own judgment, that he is upon the whole not unfit for the exigencies of the public service. I am of opinion that this part of the petition must be struck out.

The  
JACK PARK.

Dec. 11th,  
1802.

[A tender was made for the wages due till the time of impressing and a charge of *crimpage* was referred to the Registrar and merchants, to report if there was any custom in the merchant service under which such a charge was usually paid as a part of wages.]

Dec. 14th,  
1802.

THE DER MOHR, HELMER Master.

Ship lost by the  
negligence of the  
prize master.—  
Freight not  
limited to the  
proceeds of the  
cargo saved,  
decreed in toto  
against the  
captor.

THIS was a question respecting the freight of a ship lost by the negligence of the prize master. (vol. 3. p. 129.) On the former hearing the ship had been decreed to be restored in value, with freight to be a charge on the cargo, which was ultimately condemned for want of farther proof. The freight was reported by the Registrar and Merchants at the sum of 1000*l*. The proceeds of that part of the cargo which had been saved, amounted only to 600*l*.

*On a motion now made for an attachment against the Captor to pay the balance, the King's Advocate contended*—That no more freight was due than the value of the goods saved; that freight had been decreed to be a charge *on the cargo*, and could not be demanded against the captor, beyond the amount of the proceeds of the cargo, on which it was thus made a lien. The capture was justified by the condemnation of the cargo which had taken place—The voyage was from the colony of the enemy, with the property of the enemy on board. It was a commerce, therefore, not entirely innocent on the part of the ship. It became the duty of Captain *Talbot* to bring

in the ship. Under such circumstances it would be a great hardship, if this additional loss was to be thrown upon him. The loss happened without blame on the part of Captain *Talbot*, and was to be taken as a common misfortune, of which the several parties must bear their own share.

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DER MOHR.

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*On the other side, Swabey and Robinson.*—This question is to be considered, without reference to individuals,—as between the *Claimant*, and the *Belligerent State*. Whilst the Maritime States of Europe continued to retain for the public use the whole interest in prize, cases of *hardship* could never occur; because the whole fund of prize taken collectively, would compose a current account of profit and loss, out of which any particular damage might be repaired (*a*).

(*a*) The maritime States of *Europe* seem to have adopted this policy nearly about the same time. By an edict of 6th June 1702, the States of *Holland* gave the whole interest in prize to private captors, who had fitted out privateers at their own expence. They also gave to ships of war the whole of the enemy's ships of war taken in fight, and as we may suppose the whole of all other prize; since *Voet* says, "Constat itaque penes nos quicquid in mari captum est, occupantium esse." *Voet de Jure Militari*. (B. 5.) In *France* the whole interest seems to have been given, *always*, or very early, to privateers. Valin *Traite des Prises*, p. 4. Till the ordinance of September 3, 1692, ships of war took no share of prize. That ordinance allowed them a tenth. The ordinance of 1748, increased this proportion to a third, *ib.* p. 13. The ordinance of 1778, gave them all ships of war and all cargoes that might be on board such ships, and two-thirds of merchant ships and cargoes, *New Code de Prises*, vol. 1. p. 249. & seq. The ordinance of 7th October 1793, gave the whole, *ibid.* v. 2. 157. In *England* the whole interest was first given up to the captors, 6 Anne A. D. 1708, *Collec. Marit.* page 188. In *Sweden* the whole prize was given to privateers by the ordinance of 1715, *ibid.* p. 175.

The  
Dca Moun.

Dec. 14th,  
1802.

Since the interest in prize has been transferred to captors, with all the responsibility attaching on their own acts, great individual hardships may arise; but they are hardships with which the *neutral claimant* has no concern. If the justice of his claim is established, *he* is entitled to his entire indemnity. The situation of the private captor is, therefore, to be put out of view. As between *the claimant* and *the State*, the Court has, repeatedly held that the *mere* carrying of enemies property is not, in itself, by the law of this country, subject to any penalty. Freight is due to the neutral ship, as a lien on the cargo — The captor takes *cum onere*: This is, indeed, not denied; but it is argued, that, *because freight is a lien on the cargo*, it necessarily follows in all respects the fate of the cargo, and is not due but in proportion to the value of the goods actually delivered; and therefore that, in this instance, the demand is to be confined to the amount of the cargo saved. Freight may not be demandable, where there is *no* arrival and *no* delivery; at the same time it is to be remembered that cases may occur, in which the whole freight shall be due on goods that have once arrived, although *they* may not *be* sufficient to answer the demand (*a*). Here, however, there is no question as to the sufficiency of the cargo; the act of capture is to be taken as the delivery of the whole cargo, and if the goods were *then* sufficient for the demand, the captor cannot exonerate himself by

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(*a*) *Consolato*, cap. 119. — Qualunque mercante che havra caricato delle merchanzie, si guinto al luogo destinato, quelle non valessero il prezzo del nolo, è sientedimeno tenuto a pagarlo, nè basta, che egli lo paghi per le buone merci solamente, ma dee pagarlo anche per le cattive — Explication, of *Mr. Casa Regia*. —

subsequent

subsequent accidents, which may have arisen from the culpable acts of his agents. The freight, in such a case, is to be taken as part of the vessel, and as a vested interest, for which compensation is due, as much as for the ship.

The  
Dca Monn.  
Dec. 14th,  
1802.

## JUDGMENT.

Sir *W. Scott*. — In an unfortunate case like the present, the Court would certainly be disposed to give the captor all possible relief; but I need not add, that no *relief is possible*, which cannot be given consistently with the justice due to the claimant. The demand of freight is, I apprehend, an absolute demand, in cases where the ship is pronounced to be innocently employed. This vessel was captured coming from an enemy's port, under a suspicion of having on board the property of the enemy — a cargo, nevertheless which she had a perfect right to carry, provided it was not attended with any circumstances of ill faith, or unneutral conduct. No imputation of fraud, or improper conduct, has been thrown upon her. On the other side it is to be observed, that the seizure was perfectly justifiable — the ship was sent in, under very proper orders from Captain *Talbot*; but, unfortunately, his orders were *very improperly* executed by the person to whom they were given.

On the principle of law, however, I am of opinion that the freight must be taken, as having become as much the property of the neutral claimant, as the ship itself. The captor took *cum onere*: If the loss had happened by accident only in bringing in, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight, or for the ship; but the Court has already pronounced this loss not to have arisen from any casual misfortune. The

The  
DER MOHR.

Dec. 14th,  
1802.

freight is as much a part of the loss, as the ship: for he was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage, as for the ship which was to earn it, or which was rather to be considered *as having* already earned it. In the room of this fund, the captor has substituted his own personal responsibility: for the loss accrues by the fault of his agent; I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight, as to the vessel.

With respect to the attachment, that is prayed against Captain *Talbot*, as long as a hope is held out that the assistance of Government may be obtained in aid of the actual captor, 'it will be better to let this matter stand over; there must undoubtedly be a time when this forbearance must terminate, whatever the consequences may be; but, at present, I will content myself, by pronouncing, that the whole freight is due, in value, from the captor (*a*).

April 1st,  
1803.

Joint capture.—  
Claim on the  
part of a letter of  
marque ship, in  
virtue of her  
boat being in  
sight of the cap-  
ture, whilst it  
was effected by  
the boat of a  
ship of war, not  
admitted —  
Constructive as-  
sistance by boats  
how far admit-  
tible.

#### THE ODIN, HALS Master.

THIS was a question respecting a claim of joint capture, interposed on the part of the *Royal Admiral* to share in this prize, condemned, *supra*,

(*a*) On a subsequent day, it was stated to the Court, that directions had been given by Government for the payment of the amount of this restitution, in aid of the captor.

Adm.

Adm. Rep. v. 1. p. 248. The present question arose on an allegation given in on the part of the *Royal Admiral*, setting forth the facts of the case, which it is unnecessary to specify in this place, as they are sufficiently adverted to in the judgment.

The  
Odm.  
April 18,  
1803.

*On the part of the actual Captor, the King's Advocate objected*—That some of the preceding articles were irrelevant; moreover, that the whole substance of the allegation was insufficient to establish a title to share in joint capture. That the ship not being in fight, the mere presence of a boat could not even in a case of actual assistance, give the *whole* ship's crew a right to share in the proportion of their number.—That this was only a claim of *constructive* assistance, which would not entitle a *privateer herself* to share with a King's ship, on the bare plea of *being* in fight only, much less to found a claim on the mere presence of her boat.

*On the other side, Laurence and Swabey.*—On the facts stated in the allegation a question of law is raised, whether the presence of a boat is sufficient to establish an interest in joint capture. But it is to be remembered, that the whole transaction was the transaction of boats; and in a part of the world, where, owing to the variable state of the winds, it is expedient to make almost all attempts of the kind by means of boats, lest the ship, which is the object of capture, should have an opportunity of getting away. Under these circumstances, the case of two boats is, in all respects, parallel to the case of two ships; and there seems to be no reason why the same principle should not be applied. In the *Chinsurah* capture, boats borrowed from ships were allowed to establish a right for the ships to which they belonged.



The  
ODIN.

April 18,  
1803.

*Court.* — In that case, the actual capture was made by the boats.

*Laurence.* — It was so determined in this Court; but in the Court of Appeal, Lord *Camden* in delivering judgment, expressly stated the troops to be the actual captors.

[*Court.* — The real truth was, that the boat's crew first took possession, and were afterwards turned out of possession by the troops.]

With respect to the log-book, it was contended, that it was to be considered as a public instrument, and as evidence admissible, leaving it open to the parties to discuss the degree of credit that was due to it.

#### JUDGMENT.

*Sir W. Scott.* — This question arises on the admission of an allegation, given on the part of the *Royal Admiral*, being a private ship of war, an *East India* ship duly commissioned by letter of marque, claiming to share in the capture of the *Odin*. The preceding articles of the allegation state “the force of the *Royal Admiral*; and that before she left *India*, Captain *Fellowes* had received information of several ships that were suspected to be engaged in an illegal trade with the *Dutch* settlement of *Batavia*. That on his arrival at the *Cape of Good Hope* Sir *Hugh Christian* informed him that he had received directions from the Government in *India* to stop several enumerated ships, and among them the *Nancy*, the *Rendsborg*, and the *Odin*; that he, Sir *Hugh Christian*, had dispatched a frigate to cruise for them off *St. Helena*, and advised Captain *Fellowes*, if he fell in with them to detain them; that on his arrival at *St. Helena*, Captain *Fellowes* com-

“municated

“ communicated this intelligence to Governor *Brooke*, who, though apprized generally of some ships that he was advised to stop, had not received any information respecting the *Odin*.” — The allegation then goes on to state, “ that measures of co-operation were agreed on between Governor *Brooke* and Captain *Fellowes*, and that a private signal was concerted between them; that on the arrival of Captain *Tod* at *St. Helena*, Captain *Fellowes* communicated the information to him, and that Captain *Tod* agreed, that the *Royal Admiral* should co-operate.” The correspondence is then pleaded between the Governor and Captain *Tod*, in which the Governor informed him of the co-operation that had been before concerted with Captain *Brine*, under the orders of Sir *Hugh Christian*, and asked whether it seemed expedient to Captain *Tod* that the same conjoint measures should be pursued? Captain *Tod*’s answer to this proposal is exhibited, and it seems to me that a good deal will depend on this letter, which is contended to be an agreement.

The  
ODIN.  
April 1st,  
1803.

Upon this agreement I must observe that it can be pleaded only as evidence of the subsequent co-operation, for the Admiralty Court does not enforce mere agreements directly. In the letter which Captain *Tod* writes, in answer to this proposal, he says, “ I have to acquaint you, that although I have received no orders from Sir *Hugh Christian*, I have not the smallest objection to co-operate in conjunction with you, in case any ships should arrive during my stay, provided it meets with the Admiral’s approbation. But whilst I am under his orders, he will have his share of all seizures made by me; therefore, *without his consent, I can make no agreement with respect to sharing prize-money.*”

The  
Odin.

April 12,  
1801.

money, as it affects him equally as much as it does me, or the crew of the *Trusty* under my command." This letter, as I construe it, must be taken to refer only to such vessels as *should arrive in the harbour*; it could scarcely be supposed to extend to all captures, which Captain *Tod* might make, by sending out his boats. Then what is the effect of this answer? All that Captain *Tod* says is, that he had no objection, but that he had not the power of making any agreement, that should bind the Admiral and his crew: So that if the fact *had been*, that the *Odin* had actually arrived, and had been seized in harbour, this letter could not have been considered as a conclusive acceptance of the proposal so made. If the *Odin* had so arrived, the capture might have become a joint capture, by virtue of actual assistance and co-operation, but not by virtue of any specific agreement contained in this letter. Having before expressed my opinion (a) that

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(a) On the question of interest, in the capture of this vessel, a previous suit had been agitated between the Admiralty, contending for a capture in port, and the officers and crew of the *Trusty*, contending for capture *out of* port, by a boat of the *Trusty*, for their own use and benefit. In the the allegation given in on the part of the Admiralty, nearly the same representation of facts was pleaded, as that which was given in this case, stating "the previous communication with the Governor of *St. Helena*, and the consultation that was held by the Governor and Council in the presence, and with the concurrence of Captain *Todd*, &c." In the proof that was first adduced on this question, it appeared, that an officer of the *Trusty* had, in fact, boarded this vessel, out of the limits of the harbour of *St. Helena*; but as it was contended, on the part of the Admiralty, that this act of boarding was not *dona animo capiendi*, but with the intention only of affording assistance to pilot the vessel into the harbour, it appeared to the Court, that the

that the capture was made by the boat of the *Trusty out* of the harbour, I must add, that neither does the proposal apply to such a case, nor is the acceptance, on the part of Captain *Tod*, to be considered as a conclusive agreement, absolutely binding on the parties.

The  
ODIN.

April 16,  
1803.

The

the material fact respecting the *quo animo*, the *intention*, with which this act was done, had been altogether omitted in the allegations, and in the evidence, exhibited on both sides. It was thought proper, therefore, that the conclusion of the cause should be rescinded, for the purpose of admitting such evidence on that fact, as could be produced from the officers of the *Trusty*, examined under release. On a subsequent day, an *allegation* was offered on the part of the *Trusty*, pleading, that on the 6th *August* 1798, six days prior to the determination of the Governor and Council of *St. Helena* to send the *Odin* to *England*, Captain *Todd* appointed one of his officers to act as prize-master for the purpose of bringing this vessel home, and had given instructions for the course she was to steer, and for putting her into the hands of the agents of the *Trusty*. The orders were likewise annexed, as exhibits, with an affidavit, stating the circumstances under which this paper had not come to the knowledge of the parties before. In objection to this allegation it was argued, that the cause had been rescinded, only for the purpose of examining witnesses, and that under that order, it was not competent for the captors to offer a new allegation.

The Court observed, that if the fact itself, should be deemed material, it was only a question of form, Whether it should be introduced under the preceding order, or by way of petition, stating the circumstances under which this evidence had lately come to the knowledge of the parties, and praying, that an allegation might be admitted. As to the nature of the evidence now offered, the production of exhibits, after the conclusion of the cause, was a matter more favourably considered in general practice, than the production of fresh parole evidence; inasmuch as it was a description of proof that could not be so easily fabricated, or accommodated to the particular situation, and state in which the cause was left.

Owing

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The former part of this allegation is given with a view of establishing a previous concert, leading to a co-operation. In the latter part of the allegation it is stated, that, on the morning when the news arrived, Captain *Fellowes* sent a message to Captain *Tod*, informing him that he was ready for sea, and would obey any orders that he should give. A cutter was sent out, but before the cutter could come up with the *Odin*, a boat's crew from the *Trusty* had got possession of the prize, and refused to let the officer of the cutter come on board. It appears certainly to have been the intention of the Governor, and of the *Royal Admiral*, to give all assistance in their power. But something more is necessary to be established: It must be shewn, that some assistance was effectually given, and in conjunction with the actual captor, the *Trusty*. As to any previous agreement, I have already determined,

(a) Blown up in  
the *Queen Charlotte*, in the  
*Mediterranean*,  
March 1800.

Owing to the unfortunate accident by which Captain *Tod* (a) was lost in the *Mediterranean*, a reasonable ground was laid for supposing that the parties who had to manage the suit, might not be so immediately in possession of all the evidence that might be necessary to support their claim. As the Court itself had directed the cause to be opened, for the purpose of doing substantial justice, it was highly proper that any important information that could be given on the material point, which had been equally overlooked by both parties, should be received. The orders were therefore admitted to be pleaded; They being *proved*, together with the other evidence, under release, as to the *quo animo*, this proof was admitted to be sufficient by the Counsel for the Admiralty: and the Court pronounced the capture to be made by the boat of the *Trusty*, out of the harbour of *St. Helena*; and consequently the claim of the Admiralty was rejected.

that

that no such agreement is proved on the part of the claimant in joint capture; when the officers of the cutter came up, the crew of the *Trusty's* boat refused to admit them; as far therefore, as the intention of the *Trusty* is material, there is not only no proof of agreement, but on the contrary, *there is* proof of a disinclination on the part of the *Trusty*, to admit the private ship of war to act in conjunction, and under association with them.

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Then no effectual assistance having been shewn, and the disinclination of the *Trusty* having been proved, the whole case is reduced to the question of law, Whether in the case of a private ship of war, and a King's ship lying in harbour, and sending out their boats to make a capture, the boat of the private ship of war so sent out, but not coming up at the time of capture, can found a title to share in the capture made by the boat of the King's ship, on the mere principle *of being in fight*? I know of no case that would sustain such a claim. The principle of constructive assistance has been altogether thought to have been carried somewhat far; and the later inclination of Courts of Justice has been, rather to restrain than extend the rule. Between private ships of war and King's ships, the rule of law has always been held *more strictly*, and it has not been the doctrine of the Admiralty to raise constructive assistance so easily between them, as between King's ships. If the competition had been between two King's ships, it would, in my opinion, be highly questionable, whether a boat, so sent out, could support a title to share, on the mere principle *of being in fight*.

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There is, I think, a very solid ground of distinction between the claims of a boat, in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs has done by means of this boat, all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of the friend, from a *ship of war* being *seen*, or *within sight* of a capture, applies very weakly to the case of a boat—an object that attracts little notice upon the water, and whose character, even if discerned by either of the other parties, may be totally unknown to both.—More unreasonable still would this be upon actual captors, if the *constructive* co-operation of such an object would give an interest to *the entire ship* to which it belonged. Where a *ship* is in fight, she is conceived to co-operate in the proportion of her force: But what room is there for such a presumption where she co-operates only by the force of her boat?

I am not in possession of any case, in which a boat, without any actual assistance, or previous concert, has been held, *from being in sight* only, to be entitled to share as a joint captor, even to the extent of the persons actually composing the boat's crew; much less, to establish a claim of joint capture for the whole ship to which the boat belongs. I have not been able to find any precedent to that effect; nor has any been produced by the Counsel, in consequence of the enquiry which I directed to be made. Extremely different in principle is such a case, from the case of

two ships, on the grounds which I have already stated.

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I am of opinion both on principle and authority, that where no antecedent agreement is proved to have taken place, a vessel lying in harbour cannot be entitled to share in a capture made out of the harbour, by the circumstance of her boat *being merely in fight*. I have already expressed my opinion that *this was a capture made out of the harbour of St. Helena*. I am, therefore, disposed to reject this allegation (a), in the first instance, as one that cannot benefit the parties, if it is admitted to go to proof. It is a case, however, very proper to be brought before the Court, and one in which I think the parties may justly be allowed their expences.

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(a) In the case of the *Nancy, Knudson* (a), this same question was brought to the decision of the Lords of Appeal, in an allegation offered on the part of the *Royal Admiral*, stating nearly the same facts, as are set forth in the preceding recital—but concluding with an averment of rather a stronger case,—that the boat's crew of the *Royal Admiral* came up *very soon* after the boat of the *Trusty*, and *were admitted on board the Nancy*, and did actually render assistance by navigating the ship into port, and bringing her to an anchor in the harbour of *St. Helena*; and farther that the respective ships the *Royal Admiral* and the *Trusty* were lying at anchor at *St. Helena*, and were *within fight and seen* by the officers and crew of the *Nancy*, at the time of the capture. — The Court of Appeal *rejected the allegation*, as not sufficient in law to support the demand.

(a) Lords,  
18 Dec. 1803.



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1803.

THE JULIANA, CARSTENS Master.

Colonial trade—  
How far the trade  
to *Senegal* is to  
be considered  
within the prin-  
ciple of the  
colonial trade—  
Description of  
the nature of the  
settlements of  
*Senegal, Gorn,*  
*&c.*

THIS was a case of a *Danish* ship, taken on a voyage from *Bordeaux* to *Senegal*. The ship had gone from *Hamburg* to *Bordeaux*, where the chief part of the former cargo had been delivered, and a super-cargo had been taken on board, with the bulk of the present cargo, under instructions to proceed to “the coast and *Senegal*,” and to obtain, if possible, a returned cargo of gum.

The ship had sailed to *Corunna*, and was from thence going, at the time of the capture, to *Senegal*.

(a) 2d Adm.  
Repts. page 186.

The part of the cargo put on board at *Hamburg*, was restored under the authority of the *Immanuel* (a).

The question that arose in this case was, Whether *Senegal* was to be considered as a colony, or settlement of *France*, in such a manner as to bring this case under the principle applied to the colonial trade of the enemy, by which, property taken in trade between the mother country and the colony, is held liable to confiscation. On a former day it had been contended, that the trade of *Senegal* did not stand on the ordinary footing of the colonial trade; that *France* had never exercised an exclusive trade to *Senegal*, but that foreign merchants had been admitted to trade there, generally, in all articles, except gum; that this vessel was going as a general trader only, with a direction

to

to get gum, if it could be obtained, but without any such absolute injunctions, as made a return of gum a necessary consequence of the present voyage. Some affidavits were then offered, stating instances of *American* ships that had traded to *Senegal* in 1783, 1787, and 1788.

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On the other side, the *King's Advocate* relied on the case of the *Worcester* (a), in which, an *American* ship taken, with a cargo of gum, on a voyage from *Senegal* to *France*, was condemned — the claimant having failed to comply with the order of the Court, that had been made upon him, “to shew that it was a trade ordinarily open to foreigners, and not arising out of the state of war.”

(a) Adm.  
15 Jan. 1802.

The Court declined to conclude this case, and these claimants, by the inability of the former parties, to produce such proof; and gave leave to the claimants, and also to the captors, to produce information, as to the state of the trade of *Senegal* prior to the war.

On this day, the opinions of certain *French* lawyers were introduced on the part of the captors.

For the captors, the *King's Advocate* and *Swabey*. — The question in this case is, Whether the claimant can maintain his right to carry on this commerce, as a neutral trade? Certificates (b) have been exhibited,

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(b) Of Mr. *Montmeyer*, Director of the *Senegal* Company at the Island of *Gorée*, from 1789 to 1792; and of Mr. *Pelletier*, Director of the *Senegal* Company, from 1787 to 1790.

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(b) Vide Ap-  
pendix.

stating, that foreigners were allowed to sell their cargoes at *Senegal*, without prejudice to the *Senegal* Company; and that, during the war, neutral ships have been permitted to export gum (a); but whether this has taken place, as a relaxation, arising out of the pressure of war, or as the ordinary course of their trade, is not explicitly stated. The result that is to be extracted from the printed ordinances of *France*, is to this effect: "By a decree, 1st *January* 1784. — The peculiar privileges and monopoly of the gum trade were granted to a particular Company (b), denominated the *Guinea* Company. At this period, it cannot be suggested, that foreigners were permitted to engage in the gum trade. Even as to other trade, it is rather to be collected, that all trade to *Senegal* was confined to the ships of *French* subjects, and that the settlement of *Senegal* stood, in all respects, on a similar footing with that of *Goree*, which is expressly termed "*the colony of Goree*."

The next ordinance which applied to this trade, was that of 23d *January* 1791, when, under the prevalence of the new doctrine of Equality, the monopoly of the former Company was destroyed, and the gum trade was declared "to be laid open to all the *FRENCH*." If the benefit of this decree could be supposed to have extended to foreigners, as well as to *French* subjects, there could have been no need of

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(a) Certificate of Mr. *Marée*, stating, that previous to the last war, and during his residence at *Senegal* and *Goree*, from the year 1782 until 1798, neutral ships have been permitted to sell their cargoes at *Senegal*, and also to export gum, and other produce of the country, to neutral ports.

any fresh ordinance in their favour. The subsequent introduction of such an order, shews clearly, that the former extention of 1791 was still restrained to *French subjects only*, and did not embrace the ships of foreign merchants. The subsequent decrees passed in the following order:—On the 26th of *March* 1793, it was declared expedient to admit foreigners to the colonies of the *West Indies*, to trade in certain proportions, and under certain limitations, allowing them to export produce in return for articles of provisions; and this relaxation was expressly introduced for the relief (a) of the islands of the *West Indies*. But it seems that this ordinance did not include the colony or settlement of *Senegal*; for on the 29th of *March* 1793, three days after the passing of the former edict, another ordinance issued, allowing ships of the United States of *America*, and of other neutral countries (b), “to trade to *Senegal* for gum, provided they were fitted out in *French ports* and for *French merchants*, and under a recognizance to return to a *French port*.” Before this decree, foreign ships could not trade at all in gum; and under this decree they were not admitted, except under an assurance, that the property engaged in that trade, belonged to subjects of *France*.

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(a) Vide Appendix.

(b) Vide Appendix.

What is the assertion in the present claim? — “that the cargo, going in this course of trade from a port of *France* to *Senegal*, is nevertheless the property of the neutral claimant. On this point, it might be sufficient to contend, that it is not competent for the neutral merchant to avow, that he is violating the law of *France*, which requires all such trade to be carried on for the account of *French merchants only*, and therefore that this cargo is to be taken as the

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property of the enemy. But if the fact were otherwise — if under the pressure of the war it was found necessary to extend further this relaxation, and to allow, for the relief of the *Senegal* trade, that neutral merchants *might* trade thither on their own account, such a permission will not avail in the Courts of the other Belligerent: Neither will it be possible to distinguish this trade, so allowed, from other trade, which neutral merchants have been, by the Government of *France*, permitted to exercise to the other colonies of *France*; but which has, nevertheless, been deemed illegal in the Courts of this Country.

On this evidence, it is to be inferred, that *Senegal* stood on the same footing as the other colonies of *France*; this conclusion is still farther confirmed by the decree which has passed since the termination of hostilities, by which it is declared, (25th *Frimaire*, 10th year, 15th *December* 1801), (a) “that *French* ships only shall be allowed to trade in all parts of the *French Colony of Senegal*,” restoring thereby this particular branch of their colonial commerce, to the state of their other colonies. — So stands the matter of fact, as far as it can be tried by the express regulations of the public edicts of *France*. But we have brought in the opinion of *French* lawyers on this subject, who, unfortunately for us, are the same persons to whom the claimant had applied before, and whose opinion appears to be drawn up under a very strong bias in favour of the claimant's case.

As far as that opinion can be said to give a just representation of the law of *France*, it states the decrees before noticed. It admits the prohibition, but seems to rest much on this circumstance — that there was no  
*penalty*

(a) Vide Appendix.

*penalty* annexed to it, and that property employed in contravention to that ordinance, would not have been subject to confiscation. This will not affect the question of *legality*, on which alone we are at present concerned. — On other topics, introduced into that opinion, it will not perhaps be necessary to advert; it may be enough to say generally, that the train of argument indulged in that opinion is either foreign to the question proposed, or exceeds the proper bounds of an opinion, and assumes the province of the Court.

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From what has already been stated, it will sufficiently appear, that foreigners were not originally admitted, in any degree, to the gum trade of *Senegal*: that when they were admitted in 1793, it was only under partial restrictions, which are in direct opposition to the present claim; and that, if any farther relaxations have been, in point of fact, extended to neutral merchants, they are only such as have arisen out of the pressure of the war, and will not have the effect of establishing the legality of such a trade.

*On the other side, Laurence and Sewell.* — The question of property in this case is to be considered as totally closed: On the former hearing it was argued against us on this point, that the *French* never suffered any foreign ships to go to *Senegal*. Certificates have been produced from Mr. *Blanchard* (a) and from other gentlemen,

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(a) The certificate of Mr. *Blanchard*, Governor of *Senegal* from 1787 to 1801, stated, " That from the first year of the Republic, 1793, circumstances did oblige him to depart from the decrees of

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gentlemen, stating what the course of trade at *Senegal* has been. The only question that now remains to be agitated is, whether the trade to *Senegal* was so exclusively held by *France* for her own subjects, as to make it illegal for neutral merchants to trade thither in time of war. The decrees, to which the captors have adverted, were before noticed; but the Court thought, that it was left equivocal whether the monopoly might not be such as is held by our *East India* Company, a monopoly against subjects only, but not excluding foreigners from resorting thither for the purpose of general trade. It now appears, on the authority of *French* lawyers, whose opinions have been brought in by the captor, that this was the case: That the restriction was confined to gum alone, and that strangers were allowed to trade to the island of *Senegal* in every article but gum.

The voyage in this instance began at *Hamburg*, and was destined to *Corunna* and *Senegal*, with orders to the supercargo "to touch at *Senegal*, and if you find that you can trade to advantage, to get gum, ivory, wood, &c." describing it evidently as a trading voyage, which might not have taken a single article from *Senegal*, but might have been directly generally to the

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the 26th and 29th of *March* 1793, which excluded from *Senegal* all neutral ships not fitted out from a *French* port: That as long as the war continued they were admitted to trade at the island of *St. Louis* only, without being allowed to come up the river: That this measure was approved by the Minister of the Marine, since it was indispensibly necessary for the victualling the colony of *Senegal*, where the masters of neutral ships entered into an agreement to make their return to some neutral port."

adjacent

adjacent coast, where, as it is explained in the certificate of Mr. *Blanchard*, foreigners might come and carry on their traffic. Even as to the particular article of gum, it does not appear that the Company might not have disposed of it to foreigners, as our *East India* Company dispose of opium and other articles in the ports of *India*. The exclusive privilege of the Company, which was granted to them in lieu of the slave trade, was to trade up the river *Senegal*, where there is a factory established; but it does not appear that they ever attempted to engross the whole trade in those parts or that there ever was a time, when foreign vessels might not resort to that market for the purposes of general trade. It is stated by masters of different countries, and particularly Mr. *M'Iver (a)*, the master of an *English* ship, that he put in there in the year 1789, and saw merchant ships of different nations, *Danes* and *Americans*, from which he concluded that *he might have been permitted to trade there*, though it did not appear that he had occasion to make the experiment.

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(a) The affidavit of Mr. *M'Iver* stated, "that he performed a voyage from *London* to the coast in 1789; that he put into the *French* settlement of *Gorée* for refreshments, and found there a *Danish* vessel and two or three *American* vessels, trading with the *French* inhabitants of that settlement; that he is persuaded he might have been permitted to trade there in like manner; that he always understood that the *French* settlements of *Senegal* and *Gorée* have ever been free and open ports to all nations; that foreigners have never at any time been excluded therefrom; that the *French* have established no other monopoly at *Senegal* than merely an exclusive right to trade with the natives up the river at *Senegal*; but that the settlement of *Senegal* itself has ever been perfectly free and open to all nations for the purposes of trade."



The  
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## JUDGMENT.

Sir W. Scott. — This case has twice come before the Court, for the purpose of affording information as to the nature of this trade, which must, I think, be considered as a trade from a *French* port to *Senegal*, notwithstanding that part of the instructions to the supercargo, which held out a permission to go to other parts of the coast. All the clearances are made out for *Senegal*, and the supercargo says in his evidence “ that he was to dispose of his cargo at *Senegal*.”

The question to which the case seemed to be reduced was, whether *Senegal* was to be considered on the footing of the settlements of *France* in the Old World? And on this point it was necessary that information should be obtained; that the Court might see how far the principle which has been applied to the colonial settlements of the *West Indies*, both in this Court and in the Superior Court, would justly attach on this trade.

(a) Vide Appendix.

It now appears, that since the peace there has passed an ordinance of *absolute exclusion* (a) against all foreign ships, and that the monopoly of the whole trade to *Senegal*, has been established in favour of *French* ships, as strictly as in the trade with the settlements of the New World. This circumstance, though not conclusive, as to what was the state of that settlement before the war, does in some measure, furnish a presumption, at least, that the later regulation is but a recurrence to the former system. There was, however, some room to doubt, whether the trade was to be considered as of the nature of our trade to our *East India* possessions, which admits all foreigners and excludes only *British* subjects not entitled to the privileges of

of the *British* company, or whether it stood on the closer system of monopoly, applied to *European* colonies in the *West Indies*, in which all foreigners are generally interdicted. Under this doubt the Court expressed a wish that information might be obtained from *French* lawyers, as to what was the precise state of the trade.

The  
JURISCONSULTS.  
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1809.

The *captors* here complied with that direction of the Court, and have very candidly exhibited an opinion obtained by them, of which it will not be too much to say, that it contains some very extravagant and inflamed reasonings, hardly reconcilable with the nature of the functions, which a lawyer has to perform, even as an Advocate in the cause, much less with the more dignified office of certifying to foreign jurisdictions what is the precise law of the country on any particular subject (a). The only question that I wished to have answered was, "Whether it was by law permitted to foreigners, before the war, to trade to *Senegal*;" The answer to this simple question contains many sheets, in which it is only thrown in *incidentally*, and in the way of argument, that it is *assensu*, "that strangers might be permitted to trade there." The rest is entirely foreign to the purpose; and though very candidly produced by the captors, it appears to have been written in a spirit not very just towards them. The whole substance of this opinion is consumed in lectures upon other points to the *British* Court of Admiralty, which these gentlemen had neither any right nor any occasion to administer.

(a) An opinion given 26th *Fructidor*, 10th year, under the signatures of

PERIGNON,  
PASTORET,  
BELLART,  
BOUNET.

All

The  
JULIANA.  

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April 27th,  
1803.

All the evidence produced by the claimants consists of certificates of some persons, and those not on oath, stating, "that foreign vessels were allowed to go there;" but whether legally if at all, and if legally whether by special permission, or under the general system of the law applied to that colony, I am not informed. If the matter had rested here, I should have thought myself justified in condemning, for default of that information which had been required. Surely the opinion given exhibits a very strange picture of the state of jurisprudence in the country from which it comes. Suppose a similar question had been proposed to Counsel of any description in this Country, for the information of the *French* Court of Admiralty — would it have been thought necessary or decent to introduce such a train of passionate expressions, and such a long chain of reasoning as is here contained? On which, I cannot but observe, that it is totally incorrect in principle, and not in the slightest degree applicable to the question proposed. On this view of the case, I should have thought myself justified in condemning. At the same time when I see this introduced by the captors themselves, "*that it is well known* that foreigners were not excluded," I will not shut out further information, if any can be obtained, in the form of a short and plain answer to a plain question of fact.

On a subsequent day the opinion which had been obtained from *French* lawyers by the *Claimant* was brought in and read.

*King's*

*King's Advocate.* — This is an opinion (a) from two of the same gentlemen, whose opinion was introduced before; the purport of it is, “that at all times foreign vessels might resort to *Senegal*, and trade there, except in the article of gum, and that the relaxation of the monopoly granted to the *Guiana Company* (1791), necessarily led to the communication of the gum trade to all foreigners.” But how is that consistent with the ordinance, 29th *March* 1793, which expressly admits to an equal trade with *French* ships, only such foreign ships as were fitted out in *French* ports, for the account of *French* subjects, and under a stipulation to return to *French* ports. Even these gentlemen state, “that since *March* 1793, there can have been no doubt that the liberty extended to the gum trade.” All that they state, however, is that foreign vessels might go to *Senegal*. But in this case, and in the *Vrouw Cornelia*, which will immediately follow, the fitting out had been in a port of *France*, and in such cases it seems to have been indispensibly required that the property should belong to *French* subjects.

The  
JULIANA.  
April 27th,  
1803.

*On the other side, Laurence.* — By this opinion the law seems to be ascertained to stand on the footing that was before intimated, similar to the state of our

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(a) An opinion given 20th *Ventose*, 11th year, ( ) under the signatures of

SIMON,  
PERIGNON,  
BELLART.

*East*

The  
JULIANA.

April 27th,  
1803.

*East India* trade ; because if a trade is generally allowed to those parts, with the exception of a monopoly in certain articles, as in the *East*, of saltpetre or opium, the circumstance of having on board that excepted article, either by smuggling or otherwise, will not bring the case within the principle applied to the colonial trade of the *West Indies*, which stands on a general exclusion. This difference was stated by the Court on a former day, and now the fact appears to be agreeably to that distinction, that foreigners were at all times allowed to trade to *Senegal* and *Goree* with the *French* factory, but they were not allowed to go up the river to trade with the natives. The gum trade was confined to the Company, whose agents were not allowed to sell to foreigners ; but if they transgressed their powers, and actually did sell, foreigners were not exposed to any penalty for taking it on board ; though previous to the ordinance of *March 1793*, it could not be imported by them into *France*. — In this view the edict of 1793 may be deemed an extension of the former law — and also, inasmuch as it allowed foreigners to go up the river, and purchase for themselves. No objection lies, therefore, against the accuracy of the opinion on this head, that can in any manner affect the credit of the information that has been obtained. But what is the general question ? It is this, Whether foreigners might go to *Senegal* for the general purposes of trade ? If so, even in the *West India* settlements, the act of smuggling on board, certain articles, on which the restriction is still kept up by the Parent State, will not constitute a case to which the illegality derived from the general colonial principle can be applied ; as in several instances before

fore the Court of Appeal, it has been held, respecting the smuggling interposition of foreign merchants, in the *Spanish* settlements, in violation of the edicts of *Spain*.

The  
JULIAN.

April 27th,  
1803.

## JUDGMENT.

Sir *W. Scott*. — I have now to determine, whether the legality of the trade in which this ship was engaged, is affected by any thing in the laws of *France* respecting *Senegal*? As to the New World, the system of all *European* countries is so much the same, as to afford a reasonable presumption, that the trade to the colonies in the *West Indies*, is exclusively confined to the subjects of the parent state, unless the contrary is shewn. Certainly the presumption is not so strong with respect to the settlements of the *East*; since the trade to those countries has been established on a different principle, by which foreigners *are permitted* to trade in those parts. The Court was anxious, therefore, to learn what the system of *France* had actually been, with respect to the trade of *Senegal*. It has not obtained that information without considerable difficulty. The result of this enquiry now is, “ that the general trade to *Senegal* was at all times open to foreign merchants; that the monopoly of gum, which had been established in favour of a particular Company, was abolished previous to the war; and that the edict of *March* 1793, applied only to empower foreign vessels to import gum into the ports of *France* on certain conditions, and to insure a discharge in the ports of the Republic.”

The

The  
Vrouw  
HENRICA.

May 5th,  
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Where a seizure is lawfully made, the captor ought in justice to be entitled to his indemnification; and though it is commonly said that freight is a lien on the cargo, it does not necessarily follow that it is to supersede all other charges, and to enjoy an undisturbed priority of payment in all cases. In maritime law, the prior liens are sometimes postponed to later obligations — as in bottomry; from which this at least may be inferred, that the mere habit of considering freight as a lien already attaching on the cargo, at the time of capture, does not by any means dispose of this question. If subsequent considerations, arising from the necessary interests of the property (as in the case of bottomry) advance a later bond, to take precedence of bonds of prior date, why may not the lien of freight give place to such expences as are incurred, for the preservation of the cargo, and for the necessary proceedings of the captor, under a justifiable seizure?

In several instances the Court does appear to have postponed the charge of freight to that of captors expences. In the *Minerva*, 30th July 1801, from a port of France to Embden, with salt; in the *Vier Gefusters*, from Riga to Dort, 10th June 1802; the *Welbedigtheid*, from Ostend to Amsterdam, in which, though the whole expences of the captors were not allowed, owing to some misconduct, the expence of taking the depositions was admitted in preference to freight. On these considerations, it appears but reasonable, that, where captors have done no more than their duty, in bringing the cargo to adjudication, they shall be entitled to their expences for sending in, warehousing, and the necessary

fary proceedings in the cause ; and this equitable rule does seem to have been confirmed in practice, by the instances which have been stated. In the present case, the voyage was from a belligerent port to the port of *London* ; affording from that circumstance a presumption on each term of the voyage, that the cargo was liable to condemnation, either as the property of the enemy *Spaniard*, or as the property of the *British* consignee, engaged in illegal trade with the enemy. There was also an additional suspicion arising from a false destination to *Hamburg*. Under these circumstances, the captors have done no more than their duty, and are justly entitled to their indemnification, for the necessary expences incurred in bringing this case to adjudication.

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*On the other side, Laurence.*—The law of bottomry, to which reference has been made, bears no analogy to the present question. In bottomry the rule of supercession depends entirely on this principle, that, the whole property being fallen into danger, what is advanced for its preservation is not more employed for the preservation of the capital, than of the liens before attaching on it ; and for this reason priority is given to later bonds—but no such reasoning will apply to a case of this description. Freight is generally taken to be earned on the delivery of the cargo, or on capture, which stands in the place of delivery. If there is no misconduct on the part of the ship, it is a charge attaching at that time, which is not to be defeated by subsequent difficulties, or by expences, which the captor may incur in proceeding against the cargo. The ship can receive no benefit from these proceed-



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ings, and therefore no argument can be derived from the order, which is allowed to prevail in cases of bottomry.

As to other cases which have been cited, it cannot be denied but that the Court may occasionally be induced to modify the general rule. In some cases, undoubtedly, where the ship herself is not so free from suspicion, or imputation of improper conduct, as to obtain restitution, without some relaxation of the ordinary rules of the Court, it may not be unjust to modify the decree of freight, in such a manner as, it is said, has been done in the cases cited. In some of those cases the voyage was between ports of allied enemies, in which the demand for freight does not stand on the same ground: In one there was a suspicion of a false destination; and in another the master had obtained easy justice, in not being called upon to purge himself from the suspicion of going to a blockaded port. In all these cases there were some circumstances which made the restitution of the ship, without further proof, rather a measure of lenity and relaxation, and therefore the Court might exercise a greater latitude of determination in modifying the payment of freight. As to the present case, there is nothing in the conduct of the voyage to produce any unfavourable distinction against this demand. The voyage was from a port of *Spain* to *London*, and the false papers, which described a voyage to *Hamburg*, were only those that were necessary to be taken, in consequence of the prevailing rule, of not clearing out a vessel for an enemy's port.

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The Court expressed itself disposed to hold the rule laid down in the *Bremen Flugge* to be the proper rule; but as the matter had been again argued, it directed the cases cited to be looked into, and reserved the judgment for farther deliberation.

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*On a subsequent day.*—JUDGMENT.

Sir *W. Scott*.—I have considered the cases which I directed to be looked up, and I see no reason to alter the opinion which I before expressed, that freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere*: It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, and to the temporary detention of his vessel; and if the party does not prevaricate, or conduct himself in any respect with ill-faith, he is entitled to his freight. This is the rule which I am disposed to apply in all cases of neutral ships carrying on their ordinary commerce. It is the *general* rule, which may nevertheless be liable to be altered by circumstances: There is one class of cases to which I think it *ought not* to be applied—I mean the case of ships carrying on a trade between ports of allied enemies—a trade which may be said to arise in a great measure out of the circumstances of the war, though not altogether; I say not altogether, because such a trade exists in a limited degree in times of peace.

In such a course of trade, although the Court has not altogether refused freight to the neutral ship, yet it may not think it unreasonable that the captor should, in preference, be entitled to his expences, inasmuch as the nature of such a trade cannot but very much in-

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fluence the judgment which he must unavoidably form of his duty to bring in the cargo for adjudication. In the present case, the voyage is not between the ports of allied enemies, but between the ports of two *Belligerents*, from *Valencia* to *London*; That constitutes, I think, a sort of middle case, with respect to the obligation by which the captor might conceive himself bound to bring the cargo to adjudication. There might be a presumption undoubtedly that the property belonged to the enemy exporter: But there is a foundation also for presuming that it might belong to the consignee, and that it would not have been sent on a destination to this country, but under the protection of a licence.

It is therefore a case of a mixed nature, to which I shall apply a sort of a middle judgment. I will allow the captor his law expences, and direct the other expences to be postponed to the payment of freight.

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THE MARIA, JORTZ Master, and VROW  
JOHANNA.

The responsibility of captors under a commission of unlivery, does not extend to forcible robbery of goods, properly deposited in warehouses.

THIS was a question respecting the responsibility of the captors to account for certain goods, which had been restored by a decree of the Court; but which had been stolen from the warehouses, where they were deposited under the joint locks of the officers of the customs, and the agents of the captor.

On the part of the claimant, it was prayed, that the captors might be decreed to make restitution in value.

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*For the captors, the King's Advocate.*—The present question is a question on principle merely, as the material facts of the case are admitted on both sides. It is not disputed that the original seizure was justifiable, and that the warehouses were properly chosen, of sufficient strength, and kept with due diligence, on the part of the captor and the other persons who were entrusted with the custody. The accident has happened by *robbery*, for which the captors, as *bonæ fidei* possessors, are not answerable; they being to be considered as trustees, and as such exonerated from any loss which may have happened, without fault or want of care on their part.

[The Court asked, Whether there was any rule of trade respecting the responsibility of warehouse-keepers. The Registrar, after consulting Mr. *Winthrop*, said, that in *London* warehouse-keepers were responsible for robbery, and paid the loss.]

*The King's Advocate.*—Although that may be the common rule, it will not apply to a case like the present, where the captor derives no profit from letting his warehouses, and is but a joint trustee, holding only a joint key, with the public officer of the customs.

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*On the other side, Laurence.*—The character of *bona fidei* possessor will not alone exonerate the captor from this demand. Common carriers, and warehouse-keepers, are not less *bona fidei* possessors than captors, and yet they are not exempt from the responsibility of making compensation for any loss that may happen whilst the goods are under their custody. This is the ordinary rule of bailment in every system of law; and there is nothing in the Prize Act, that makes any alteration, to put foreigners on a worse footing than that on which people ordinarily stand, whose goods are taken into the possession of other persons. If the warehouse-keeper would be responsible, the captor, having taken the key from the warehouse-keeper, takes also on himself the responsibility to make restitution.

In every case on the law of bailment due diligence is required: But what is due diligence? or what is the effect of that plea? Against a *vis major*, or the rapine of a public enemy, it may be a sufficient justification. But in all countries, where a public police is established, it is presumed that the public force will be sufficient to prevent private depredation, and therefore the same plea is not admitted against losses of that description. In this case, the captors have still less ground of defence, since it seems that the first acts of plunder were committed by the porters who were employed by them, and are to be considered as their agents. They are therefore, on every principle of law, responsible for their acts.

The Court expressed itself most anxious, that all complaints of this kind should be prevented; and directed

directed the Registrar to search for precedents, if there were any, in which a similar demand had been brought before the Court.

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*On a subsequent day.* — JUDGMENT.

Sir *W. Scott*. — These two cases came before the Court on a former day, on a question of sufficient importance to induce the Court to pause for deliberation on the judgment which it should pronounce. The point is, how far a captor is responsible for loss alleged to be sustained under a commission of unlivery, which had been directed to him by the decree of the Court?

There has been some attempt to charge the captor with negligent keeping, but I think that charge is not substantiated. If it had been made out, there can be no doubt but that he would be answerable to the utmost; for though the original seizure might be justifiable, yet the captor holds but an imperfect right; the property may turn out to belong to others, and if the captor puts it into an improper place, or keeps it with too little attention, he must be liable to the consequences, if the goods are not kept with the same caution with which a prudent person would keep his own property. But there is no ground for any imputation of personal negligence in this case, because it appears that the loss happened by burglary, the warehouse having been broken open, and the goods stolen.

This case has been assimilated in argument to the case of a common carrier, or inn-keeper, against whom the common law of this country does raise the presumption of an *assumpsit* for safe custody. But it

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is to be remembered, that *they* receive a reward for their undertaking, and provide this custody only for a valuable consideration. Even the principle, as applied to *them*, is, I conceive, of the peculiar policy of our law. It is confined to persons of a particular description, and is not to be extended, as being the general law of bailment, to persons who receive no consideration for their care, and are only to be required to furnish such care, and due diligence, as they would apply to their own property.

The goods were taken *jure belli*: The captor had a right to bring them in, and if any accident had happened in so doing, he would have been excusable, except for want of due care on the part of himself or his agents. When the goods were brought in, they were placed under the custody of the law. It became necessary to take them out of the ship, and the captor obtained a commission of unlivery from the Court; they were put into warehouses, and nothing has been advanced to shew that these warehouses were not proper places, and sufficiently secure. The question comes forward therefore on the general principle, and on this point, I am disposed to think, that the captor is not responsible for a loss happening to goods whilst they were under the custody of the law.

But it is said, "that such a rule will operate *hardly* against the foreign claimant, and that it is not reasonable to address to a subject of another country, a justification arising out of the insufficiency of our own police." "When you take his property, it is said, you are bound to answer for secure keeping. However reasonably you might alledge this excuse of robbery to persons living under the protection of the same law,

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law, foreigners have nothing to do with the defects of our law, or the execution of it." In my opinion this mode of reasoning is a little too rigorous upon all captors, and indeed upon all countries. In all countries, under whatever system of police, *thieves break through and steal*. It is the universal condition ascribed to things in this world in every part of it, and not peculiar to any one country, much less to our own. All nations stand in this respect on a common footing; the same thing might happen at *Gluckstadt*, to *English* goods carried in as prize and deposited there, and in such a case, I apprehend, the Courts of *Denmark* would and ought to exonerate the *Danish* captor. In reciprocal and general justice, that which may happen in any country under any system of police, is that from which innocent captors of all countries ought to be protected. *Veniam petimusque damusque vicissim* is the rule for such contingencies.

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If the captor has used due diligence, he is exonerated; it is necessary to shew negligence on his part, in order to fix a responsibility upon him.

Captor dismissed,



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THE EVERT, EVERTS Master.

Contraband *Pafs* hemp—*Quere*, as to the quality of hemp of that denomination—Rule as to *native produce*, how understood with respect to *Lubec* and the *Hans Towns*.

THIS was a case of a cargo of hemp going from *Lubec* to *Amsterdam*, and claimed for merchants of *Lubec*. In the bills of lading it was described as *Pafs* hemp. On that point a doubt arose as to the particular character of *Pafs* hemp, a term not remembered to have occurred before. On this question a reference was directed to be made to official persons in His Majesty's dock-yard.

*On the part of the captors, the King's Advocate contended*—That hemp was to be considered as contraband, unless exempted under the relaxation which had been allowed in favour of nations exporting *their own produce*. That hemp could not be the produce of *Lubec*; and was therefore to be considered under its general character of contraband, and as such was subject to condemnation.

*On the other side, Laurence.*—The rule is not to be applied *strictly* to *Lubec* and the *Hans Towns*, which are scarcely producing countries. The equity of the relaxation requires that they should be deemed within the benefit of the rule, whilst they are engaged only in exporting the produce of those neighbouring districts of the *German Empire*, of which they are members.

JUDGMENT.

## JUDGMENT.

Sir *W. Scott*. — It would, I think, be too hard to restrain those towns to the produce of their own particular territory. But as hemp is now held to be contraband, in its general character, it lies on the claimants to shew, that there is any thing in the particular circumstances of the case to vary that character, and entitle it to any exemption. On this point, therefore, I shall hold, that it was incumbent on the claimants to shew, that the hemp was of the growth of those neighbouring districts, whose produce they are usually employed in exporting in the ordinary course of their trade. As that has not been done, I shall pronounce this cargo to be contraband, subject to the inquiry which has been directed to be made as to its quality.

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## THE VENUS, ROSDALE Master.

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THIS was a question respecting a *British* vessel which had gone to *Marseilles*, under cartel, for the exchange of prisoners, and had there taken on board a cargo, and was stranded and captured on a voyage to *Port Mahon*.

A cartel ship is not at liberty to trade or take in a cargo—Penalty of confiscation.

*On the part of the captor, the King's Advocate and Parsons contended—That the ship was confiscable in consequence*

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consequence of the illegal trade in which she had been employed.

*On the part of the owner of the ship, Laurence.*—An objection of this nature cannot very *consistently* be pressed against the ship, after several parts of what is now called *cargo*, have been restored in the Court of Appeal. The articles taken on board were only little packages, shipped by the master, without the privity or knowledge of her owner, and against the remonstrance of the mate: Under the hope of private emolument, the master was induced to take on board three *Jews*, with their packages, for the gratuity of 2*cl.* in the nature of freight; for the whole goods so taken, parts to the amount of 18-20ths of the freight have been restored by the Lords of Appeal; as to what remains, it is too much to call this a trading with the enemy, or to say that it is to be considered as an act done in contravention of the cartel, so as to work the forfeiture of the ship.

(a) *Idle v. Van-  
neck, Bunbury's  
Reports, p. 230.*

In analogous cases, arising under the revenue laws, the Judges of the common law were formerly disposed to hold, that packages of small value, taken in by the master, should not necessarily confiscate the ship (a), and though they have since, on reconsideration, changed that opinion, as conceiving themselves tied down by the express letter of the statute, they have, in the expression of their former inclination of mind, sufficiently borne testimony to what they considered to be the equity of the case, independently of any precise regulation of statute.

*On the part of the captors, it was replied*—That the act of taking a cargo on board was a violation of  
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the particular character under which the ship was sent to the port of an enemy; that the contract had stamped that character upon her, and that it was not competent to the owner to advance a claim for his ship, taken in the exercise of an illegal trade with the enemy. On the amount of the property restored by the Lords, it was contended, that it was only of the value of 49*l.* out of 450*l.* and that the question of trade was not mooted.

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### JUDGMENT.

Sir *W. Scott*. — The question is respecting the restitution of the remaining proceeds of this vessel, which was wrecked on a voyage from *Marseilles* to *Minorca*, having gone to the port of the enemy as a cartel-ship. Certain it is, that the conduct of ships of this description cannot be too narrowly watched: The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care, that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. It is not a question of gain, but one on which depends the recovery of the liberty of individuals who may happen to have become prisoners of war; it is, therefore, a species of navigation, which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules which have been built upon it, since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely calamitous to individuals of both countries.

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It is a species of navigation, therefore, as I have before observed, which more than any other requires to be most narrowly watched : There is no way by which this purity of conduct can be maintained, but by considering the owner as answerable for the due execution of the service on which his vessel is employed : It is the very last description of cases in which the responsibility of the owner ought to be relaxed. At the same time, I will not say that, if the master had taken on board a few articles for his own petty profit, such an act should, in all cases, subject the property of the owner of considerable value to confiscation : but where goods are not clandestinely taken on board, but in such quantities, and in such a manner, as to call for the remonstrance of the officers of the ship, as was the case in the present instance, it is, I think, too much to say, that it is such petty malversation as shall be imputable only to the master.

Cartel-ships are subject to a double obligation, to both countries, not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country ; both countries are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse ; all trade must, therefore, be held to be prohibited, and it is not without the consent of both Governments, that vessels engaged on that service can be permitted to take in any goods whatever.

This vessel went to *Marseilles*, and discharged her prisoners, and then she ought to have gone away. Instead of pursuing this line of conduct, the master took on board three *Jews*, not merely with their pacotilles, but with goods, which are distinguished from pacotilles by this circumstance, that they were  
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made subject to a distinct freight: they were, besides, not taken on board in an obscure way, or clandestinely, but in such a manner as to draw upon the master the advice and remonstrance of his own officers, and of the masters of other neutral vessels, who must, therefore, have considered this transaction not as the mere taking in a few pacotilles, but as such an act of trading as might be expected to draw on it the confiscation of the property of his employer. Such a conduct was, in the first place, a direct breach of his obligation to the enemy; for I do not see that there was any licence or permission, even on the part of the country where he was: It is also a breach of his obligation to his own country.

Then as to the consequences of such an act: — It is not to be said, that because the Lords of Appeal have restored some of the goods, the question, *as to the ship*, is necessarily superseded. It does not appear that this objection was taken in the superior Court: What might have been the judgment of that Court upon it, if it had been brought into discussion, I cannot say: It does not seem necessarily to follow, that because the claimant of the goods was innocent, being possibly ignorant of the condition of the vessel, the master's act, in taking them on board, was not a culpable act, to be visited by confiscation of the ship. It is said, the amount of the goods restored was very small; but on this fact there is some disagreement in the representation of the different parties. The captors have made a distinct averment, by affidavit, that the property restored was only of the value of 49*l.*, whilst the claimants, who contend for a much larger quantity, have left it to be spelt out by bills of lading, and

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a reference to accounts which are not very intelligible: If it were necessary to determine on this fact, the affidavit of the captors appears to me to be entitled to the most credit; but on the principle of law, considering that the duty of the master bound him to abstain from all traffic whatever, and that the slightest deviation from this duty, especially if sanctioned by a judicial determination, might lead to the most calamitous consequences, I do not think myself justified to restore this property, and shall pronounce it subject to condemnation.

June 28th,  
1803.

#### THE PICIMENTO, GARCAI Master.

Jurisdiction of the High Court of Admiralty applied to carry into effect the sentence of a Vice-Admiralty Court, which had been abolished, previous to the final execution of its sentence.

THIS was a case of a *Portuguese* vessel, captured, and brought to adjudication in the Court of Vice-Admiralty at the *Cape of Good Hope*, where the Court pronounced a sentence of restitution with costs and damages.

From this sentence the captor appealed, but on the non-prosecution of his appeal, in the ordinary time, the Court of Appeal pronounced the appeal to be deserted, and remitted the cause.

Before the sentence of the Court, at the *Cape of Good Hope*, could be carried into execution, the settlement itself was given up, according to the Treaty of *Amiens*, and the Records of the Court of Vice-Admiralty were removed, and deposited in the Registry of the High Court of Admiralty.

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An application was now made on behalf of the claimant, praying that the High Court of Admiralty would carry into execution the decree of the Vice-Admiralty Court.

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The captors appeared under protest, denying the jurisdiction of the Court.

*On this point, Arnold and Adams contended, — That the High Court of Admiralty had no jurisdiction to interfere in a cause which had already been agitated and determined in another Court: That, although it might proceed originally in cases of Prize carried into any parts of the King's dominions, it could not interpose to carry into effect the judgment of another Court.*

*For the Claimant, The King's Advocate and Robinson.*

*The Court stopped the argument—and directed an application to be first made to the Lords Commissioners of Appeal, that it might be known whether They thought themselves competent to give redress.*

*On a subsequent day, the King's Advocate said— That he had moved the question before the Court of Appeal, but that the Lords were of opinion, that they had only an appellate jurisdiction, and that as that Court had dismissed the appeal, they could not take up the cause, de novo.*

*Court.—I shall over-rule the protest, and direct the process of this Court to issue as prayed.—The Court of Admiralty appears to me to have general jurisdiction sufficient to aid the process of the Vice-Admiralty Court in order to prevent a total failure of justice.*



August 12th,  
1803.

### THE ORION, CUSHING Master.

Claim of Admiral Kingsmill for a flag-eighth in a capture made by a frigate, formerly under his command, rejected, on account of orders given to the frigate by the Admiralty, which were held to constitute a separate and distinct service.

THIS was a question respecting the right of Admiral Kingsmill, as Admiral of the *Irish* station, to share in certain captures, made by His Majesty's ship *Unicorn*, in the *Channel*, September 24th, 1796. The point contested on the part of the *Unicorn* was, Whether that ship was not to be considered as separated from the *Irish* station, by subsequent orders from the Admiralty, in such a manner as to supersede, or suspend, the authority of the Admiral of the station, at the time of capture, and defeat his claim to a flag-eighth.

*On the part of Sir Thomas Williams, the King's Advocate and Arnold.*—The material point in this question lies in a very narrow compass, and is not much aided by many topics, which have been introduced into the pleadings, such as the limits of the *Irish* station, the ordinary route to *Ireland*, and the practice of notifying to an Admiral the detachment of any vessel from his station. The limits of the station are immaterial, inasmuch as the proclamation does not restrict the Admiral's right to his flag-eighth, only to captures made within the limits of his station: The practice of making notification to the Admiral is also irrelevant, since, however proper it may be as a general rule, and likely to be observed, it is not asserted to have been an *invariable* rule; and, therefore, the omission of it will not in any degree affect the claim of the parties on one side or the other.

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What has been said respecting the route to *Ireland*, has been advanced with a view of shewing that Admiral *Kingsmill* did recommend it to his cruizers to go round by *Scilly*, and that he was in the practice of directing them to take a range down to the coast of *France*, in making their passage from *Cork* to *Eng'land*; but, even on this point, the evidence would fail to shew that these directions were given to any other than cruizing frigates: On the contrary, the result is, that the passage *through Scilly* is the safest and most expeditious course, though liable to occasional obstructions from the unfavourable state of the winds; and whatever course might be taken by other ships, it appears to have been the practice of Sir *Thomas Williams* to go within the *Scilly Isles*, when left to his own determination, to make his passage in the most expeditious manner. The real question in the case is, Whether the *Unicorn* was, at the time of capture, sailing under the orders of Admiral *Kingsmill*, or, in other words, whether he was, according to the proclamation, in any way "directing or assisting in the capture." These are the terms required in the proclamation, on which alone the right to the flag-eighth depends; and if they cannot be shewn to be supported by the circumstances of the case, there is no other ground on which the Admiral's claim can be sustained.

If the capture can be proved to have been made in the execution of Admiral *Kingsmill's* general orders, or by his council or advice, the flag-eighth must be pronounced to be due; but if his orders had been superseded by competent authority, and if the capture

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was made during the execution of another service, then the Admiral will not be entitled.

Admiral *Kingsmill* had directed Sir *Thomas Williams* "to return to *Portsmouth* to refit; to acquaint the Lords of the Admiralty with his arrival; to lose no time in refitting; and to return for further orders:"—these were the last orders received from Admiral *Kingsmill*.—Sir *Thomas Williams* was to return without loss of time, and receive further orders: Sir *Thomas Williams* proceeded to repair his vessel, and acquainted the Lords of the Admiralty with his arrival; but no further communication passed between him and Admiral *Kingsmill* for two or three months. If this intermission had happened without any orders from the Admiralty, would any body have said that Sir *Thomas Williams* was obeying the orders of Admiral *Kingsmill*, or that he was not rather liable to be called to account for acting so contrary to the last orders, which he had received from the Admiral of the station?

He was detained for special purposes by the Admiralty—and it would not be too much to maintain that, after having been employed on those services, and kept at *Spithead* so long, under the directions of the Admiralty, it would have required fresh orders before he could be said to be placed again under the command of Admiral *Kingsmill*; however that may be, the final directions of the Admiralty, which led to this capture, do not leave it to be shewn by implication only, that he had not again come under the command of Admiral *Kingsmill* at the time of capture.—Those orders were "to take a short range in the Chops of the *Channel*, for the protection of the homeward-bound trade."

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He cruized accordingly sixteen days in the Chops of the *Channel*: In doing this, and in returning back to *Portsmouth* with his Prize, could he be said to be acting with any reference to Admiral *Kingsmill's* orders; or might he not have been liable to be called to a court martial for his absence in *Ireland*, which on the event of any engagement, or any service to be performed, might have been of the most important consequences? For all these consequences Admiral *Kingsmill* would have been responsible, and Sir *Thomas Williams* would have been liable to be called to a court martial if Admiral *Kingsmill's* orders had not been superseded. But what notice was taken of it? On his return, he informed the Admiralty of what he had done—Is there any reprehension, or any intimation dropping from the Admiralty that he had misconducted himself? On the contrary, they approved of what he had done.—Was any communication made to Admiral *Kingsmill*, or did Admiral *Kingsmill* ever interpose, or complain that his orders had not been obeyed?—No, the impression of Admiral *Kingsmill*, therefore, evidently appears to have been, that Sir *Thomas Williams* was acting under the only justification that could warrant such a conduct—under the order of some superior authority. On this point the whole argument rests, that Sir *Thomas Williams* was, at the time of capture, doing that, without censure or imputation, which he could not have done, if he had been governed only by the orders of Admiral *Kingsmill*.

With regard to the place of capture, it is attempted to be shewn, that the capture was made under a direct course for *Ireland*. It is true, Sir *Thomas Williams* might not be at any time in a latitude or longitude in

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which he might not have been brought by winds, or other accidental circumstances, in the ordinary course from *Plymouth* to *Ireland*; but the fact is, that he was not going, at the time of the capture, in such a course as led to *Ireland*, he was not going *immediately to Ireland*. By a reference to the chart, it will appear, that on the 21st he was sailing to the southward; and on the 22d, the first of these captures was made: He was not pursuing a course to *Ireland*; and if not, he could not be said to have returned to his station, or to be under the direction of Admiral *Kingsmill*.

*On the part of Admiral Kingsmill, Laurence and Swabey.*—The argument offered on the other side, to restrict the right of the Admiral to his flag-eighth, is built on a rigorous interpretation of the proclamation, in opposition to the common understanding of the navy, and of the Lords of the Admiralty, as explained by themselves. It is contended, in the first place, that a flag-officer must make out either that *he was on board, or assisting and directing*, and then we are referred to a restricted interpretation of the word *assisting*, differing from that which is the general and received opinion of the navy. Some elucidation of this point may be derived from those other parts of the proclamation, which speak of the time when an Admiral assumes his command over a station. *This* is unquestionably understood of command assumed, *not over* every particular ship, but *on the station generally*; and from that time he will be entitled to his share of a prize made by any particular vessel, though at a distance, and without having received any directions from him. It appears therefore, that in this respect the words “*assisting or directing*”  
are

are capable of a much wider interpretation than that which has been applied to them on the other side.

The limits of the *Irish* station have been pleaded with a view of shewing what is *now not* contradicted on the other side ; that the place of capture was within these limits as they existed in 1796, previous to the late restrictions (a) which have been put upon them by the Lords of the Admiralty. It is proved also, that the course prescribed by Admiral *Kingsmill* to his cruizers, on their way *to* and *from England*, was to proceed round the *Scilly* isles, for the purpose of intercepting the trade of the enemy on their own coasts. From these facts it will result not only that the capture was made within the station of Admiral *Kingsmill*, but that Sir *Thomas Williams* was acting, at the time, in a manner perfectly reconcileable with the duty prescribed to him by the orders, which he had received from Admiral *Kingsmill*, and which had never been revoked.

It is objected, however, that they had been superseded from another quarter, and that the orders which had been from time to time given by the Lords of the Admiralty, would have the effect of detaching Sir *Thomas Williams* from the *Irish* station, and of appropriating him to another service. On detaching any vessel from a station, it might be expected, that notice of such an alteration should be communicated to the Admiral—and so the general practice appears to have been ; as it is certified by several officers of distinction, and by clerks of long experience in the business of the Admiralty. When such a reasonable and usual form has been omitted, although the legal effect of such *detachment, if made*, might not be in any manner shaken by it, yet, *prima facie*, it affords a strong inference,

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(a) Vide infra.

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inference, that no such detachment *was* intended ; it is therefore in that point of view not an immaterial piece of evidence to controul and qualify the interpretation, which is to be put on these orders of the Admiralty, on which the whole case of *Sir Thomas Williams* depends.

Then what are the orders which have passed ? The first orders that *Sir Thomas Williams* received, and to which all the subsequent orders of the Admiralty refer, were in these words : “ At your arrival at *Portsmouth*, “ you are to acquaint the Secretary of the Admiralty “ therewith, and then to loose no time in having the “ *Unicorn* refitted, and in returning hither for my further orders.” *Sir Thomas Williams* accordingly acquainted the Lords of the Admiralty of his arrival at *Portsmouth*. In answer to that communication he was directed “ to take in stores, &c. and having so done, “ to continued to follow the orders of *Admiral Kingsmill* for his farther proceedings.” *Admiral Kingsmill* was no change in the relation of the parties.

The second orders which came from the Admiralty (25th July 1796), directed *Sir Thomas Williams* “ to take certain ships bound to *Ireland* under your convoy, and see them in safety to the ports of their destination, and having so done, continue to follow the orders of *Admiral Kingsmill* for your farther proceedings.” The orders go on : “ If there should be any other “ trade at *Spithead* bound to the Westward, or into “ the *Irish* Channel, ready and willing to accompany “ you when you leave *Spithead*, you are to take them “ under your convoy, and use your best endeavours “ to see them in safety, as your way and theirs may “ be together.” The course in which he was to sail with

with these ships was precisely that in which he was to return to his station. So far the Admiralty seems not to have contemplated any change or alteration, or to have entertained a design of detaching Sir *Thomas Williams* from the *Irish* station. This becomes more important from the farther circumstance, that when the third orders issue, they were substantially engrafted on the former orders, by directing him “to deliver the money, and to proceed according to former orders.”

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On the 25th *July* there was a farther order from the Admiralty to wait for some guns that were to be sent from *Woolwich*. On the 11th *August*, Sir *Thomas Williams* writes to inform the Lords of the Admiralty, “that the ships that were to sail under his convoy had not arrived, and requests to know whether he is to wait for them, or to proceed to his station under his former orders.” On the 13th, the Admiralty directs him to wait their arrival.” On the 17th, he is directed “not to wait for the *Lark*, but to proceed to *Cork* agreeable to the orders you are under.” On the 27th *August* he is directed “to proceed to *St. Helens*, and wait there for his convoy.” And on the 8th *September* comes the letter on which the case principally depends: “The Navy Board having informed us, that the sum of 20,000*l.* is intended to be sent to *Portsmouth*, where it will arrive on the 11th, for the purpose of being forwarded from thence to *Plymouth*, you are hereby required and directed, as soon as the said money shall arrive at *Portsmouth*, to receive it on board the ship you command, and putting to sea the first opportunity of wind and weather, make the best of your way to *Plymouth*, without taking with you any trade, the charge of which you are to consider  
“yourself



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“ yourself released from ; and having delivered the  
“ money above-mentioned, agreeable to its consign-  
“ ment, you are to proceed in the *Unicorn* to *Cork*  
“ agreeable to former orders, taking a short range on  
“ your way thither, so as to enable you to fall in  
“ with any homeward-bound ships coming into the  
“ Channel, to which you are to afford any protection  
“ in your power they may stand in need of.” It  
has so happened, that in *this range*, which is no other  
than is frequently used by cruizers on that station at  
their own discretion, and which the Commander of  
the *Irish* station had frequently recommended and ap-  
proved, these captures were made.

On these orders it is impossible not to observe,  
that from the first to the last there is a continuation  
of Admiral *Kingsmill's* orders, by the directions given  
to Sir *Thomas Williams* on all occasions to conform to  
*them*. The former directions of the 25th *July* were  
to return to *Cork*, and to continue to follow the orders  
of Admiral *Kingsmill*. In what respect can these  
latter orders of the 8th *September* be said to differ from  
those? The former prescribed only a concurrent service,  
and in words in no manner distinguishable from the lat-  
ter orders. The terms were, “to return taking a convoy.”  
The orders of the 8th *September* were “to return, taking  
a short range on your way ;” so that nothing was directed  
or supposed to be performed by him, but on his way  
to *Ireland*. Had the orders been to cruise for any certain  
time, or for any particular purpose, and then to return,  
they might have admitted a different interpretation :  
But they are not so worded ; they make no distinction  
of time, nor of service, but only direct Sir *Thomas*  
*Williams* to return, taking this short range on his way.

As

As to what passed afterwards, whether Sir *Thomas Williams* wrote to Admiral *Kingsmill* to inform him of what he had done or not, seems totally immaterial. It appears that he was to proceed immediately to *Cork*, and might make the communication in person. This, however, is certain, that Sir *Thomas Williams* did proceed to *Cork* without any farther orders, which, had he *been really* detached from that station, he would not have done, without orders to put himself again under the command of that station. On the whole it is submitted, that the interpretation contended for on the other side is too rigorous, and not to be maintained; that Sir *Thomas Williams* was at all times kept connected with the *Irish* station, by the constant reference to the orders of Admiral *Kingsmill*; that he was directed to do nothing but on his way to *Ireland*;" and that this capture was made *on his way*, and in such cruising ground as was frequently visited by the frigates on that station, by the order and particular direction of the Admiral.

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## JUDGMENT.

Sir *W. Scott*. — This is a question on a claim for a flag-eighth, which is asserted by Admiral *Kingsmill* against Sir *Thomas Williams*, on account of several ships taken by the *Unicorn* in the Channel the 24th September 1796. It has been observed, and I am glad to observe, that it is a question of mere right between these two very respectable officers. There is nothing in the question itself, that is not fit to be made a subject of fair and liberal discussion — nothing in the manner in which it has been agitated, that imputes any thing unhandsome or unfriendly to the conduct of either of the parties. I have to lament, however, that  
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the cause should have remained so long undecided, and that it should have taken so wide a circuit beyond what may have been required by the real necessity of the case. I lament this, I say, without imputing censure to either party. It is not an unnatural thing, that parties should be desirous of pressing into their service every circumstance, however minute, that may be supposed to afford either illustration or confirmation to the material facts, on which their supposed claims are constructed. At the same time it is extremely to be wished, that this disposition should be restrained within certain bounds ; since it leads to such consequences of delay and expence, as are mischievous to the public service, and reflect some degree of discredit on the Court. This cause has been depending some years : Plea has been given upon plea, in order to introduce circumstances which now, by general consent, have been dismissed in argument, as bearing a very slight and remote application to the question. A very large expence has been accumulated, and some degree of odium, I fear, against the Court — and all *this* to answer no one call of real benefit to either of the parties, who are concerned in the agitation of the present question.

The material facts are, first, an admitted fact that *Sir Thomas Williams was, at one time, under the command of Admiral Kingsmill in such a manner as most clearly to entitle Admiral Kingsmill to the flag-righth.* The next material fact is one which is contested, and is to be ascertained by evidence — it is this : Whether any act was done that did totally supersede, or suspend for a time, this command ? for I presume that a temporary suspension might be sufficient for this purpose ;

pose; a total separation is not requisite: it is not necessary that there should be no prospect of a speedy revival of the command; It is enough, if another competent authority, and still more if a paramount authority, had employed him on a clear, distinct, and separate service, although that service might, in its own nature, be very short, and the party be directed immediately after the performance of it to revert to his former relation of subjection.

I have said a *separate service*, because it would be too much to say, that there may not be services so coincident as not to affect the relation. There may be duties which can hardly be considered as obstructing the execution of the original duties—mere incidents, and nothing more. It may, perhaps, be extremely difficult to distinguish, in particular cases, whether the new services are merely of this incidental nature: It may not be easy to lay down any general criterion, that shall be sufficient for all cases: Courts must distinguish, as well as they can, when the cases arise, subject undoubtedly to a possibility of some misapprehension, in a matter which, in the nature of it, admits of very thin partitions, of very nice and slender gradations. One safe ground, on which the discretion of a Court might, perhaps, venture to trust itself, would be, if the new service imposed was of such a kind, as necessarily to carry the party out of the direction, and in a contrary direction, to that in which the original service would have engaged him. If the service carries him merely on his road, it may be too much to say, that this is to be deemed a separate service; it produces no separation—but if it is *that*, which *by necessity* carries him, or by probability *may* carry

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carry him elsewhere, then I incline to think, that it has something of the character of a separate service, and does *pro tempore* lay the original authority asleep, till its functions are executed.

Admiral *Kingsmill* was the Admiral on the *Irish* station; and at that time the limits of the station appear not to have been very accurately defined (a). The orders delivered by Admiral *Kingsmill* to Sir *Thomas Williams*, directed him to go to *Portsmouth* with convoy, and there to refit. The orders are, "to have his ships refitted, to inform the Lords of the Admiralty of his arrival, and to lose no time in refitting, and returning for further orders." Sir *Thomas Williams* goes to *Spithead*. He writes to the Admiralty, as he was directed to do. At this time, the Admiralty *might* have given him orders merely *confirmatory*; They *might have said*, get your ship refitted, and return to the *Irish* station; Such orders would have produced no new effect, in altering the situation of the parties. The Admiralty *might*

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(a) It appeared from one of the pleas, that the *Irish* station had been newly created, as an independent station, at the commencement of the last war, and that the limits of the station were not very correctly defined previous to the 4th of *August* 1797; when the Secretary of the Admiralty addressed a letter to Admiral *Kingsmill*, approving of the re-capture which had been made of two large *Portuguese* ships, by the *Galatea* and *Doris*; but concluding, "I am commanded by their Lordships to acquaint you, that they are pleased with the success of those officers, and have directed me to desire you will in future confine the limits of the stations of the cruising ships under your orders to the northward of *Ushant*, that they may be at hand, in case their service should be required on the coast of *Ireland*."

EVAN NEPEAN.

also

also have given orders so concurrent, and coincident, as hardly to have any effect. For instance, the orders *might have* said, refit as fast as you can; here are ships going on the same route; protect them as far as you fail together. All this would be to be done *in itinere*; It would scarcely occasion a retardation of his return; at the utmost, it would but produce a mere variation in the celerity of his movements, and no deviation. So if the Admiralty had said, here is money to be delivered at *Plymouth*, drop it there as you pass, and go on; I don't know if *that* could have been deemed an essential variation; All the effect would have been to create a mere variation of the celerity of his return, and nothing more—a mere dropping a parcel on the road, without producing any deviation; though it might have been very different, if the money had been to be conveyed in a contrary direction, as, for instance, if it had been ordered to be carried to *Woolwich* or *London*.

Now the fact is, that orders of all these several kinds were actually given by the Admiralty; and if the matter had rested here, the authority of the Admiral would have been clearer. But it is *likewise* a fact, that all these orders were superseded by final orders (a), bearing date, 8th *September* 1796. The question is, what is the effect of these orders? On the first view, perhaps, the words, “taking a short range,” may be thought too slight to be considered otherwise than as a mere coincident service, directing, as has been said, the mode of performing it. But there was an ulterior purpose, “*to fall in with the homeward bound ships, and afford any protection they may stand in need of.*” Upon these words, it will be proper

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(a) Vide *supra*,  
p. 369.

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proper to enquire first, what they *might* in fact lead to? And secondly, what, upon the actual interpretation given by Sir *Thomas Williams*, and adopted by the Admiralty, they *did lead to*? In the first place, it is very apparent, that a fair construction of these orders *might lead* this officer back to *Portsmouth*; for who can say, that *that* might not be a *necessary protection* for some of these ships? Suppose he had met with some of them in a disabled state—Suppose there might be intelligence of enemy's privateers hovering about them, would Sir *Thomas Williams* have obeyed these orders, if he had travelled on to *Ireland*, and left them to their fate? Most certainly not—He was to give them *any protection* they stood in need of: They *might want* protection up to their ports, and it was his duty, under these directions, to give it.

In failing under such orders, it is impossible to say, that his conduct was any longer under the immediate direction of Admiral *Kingsmill*, for it was to depend entirely on circumstances, whether it might not be the very reverse of what Admiral *Kingsmill* had commanded. Instead of returning to *Ireland* with dispatches, these directions bound him to the necessity of coming back to *English* ports, if circumstances should require it—No man can say, that if *he* made a prize, whilst so employed, Admiral *Kingsmill* was *directing and assisting in that capture*; and he *must*, I apprehend, *be directing and assisting*, for that is the condition on which alone his title deed, the proclamation, grants the flag-eighth. Supposing even that there was a connection of subjection remaining, still it is impossible to say, that Admiral *Kingsmill*  
could

could be considered, in any manner, as directing and assisting in such captures.

The next inquiry is, *what actually was* the exposition applied by Sir *Thomas Williams*, and approved by the Admiralty. His letter is strong evidence on this point, and proves to demonstration, that he so expounded his instructions in fact, and that the Lords of the Admiralty justified that exposition. His letter (a) states, "that he was cruising with the view of falling in with the merchant ships; that he did fall in with some of them; that he learnt there were others much scattered by a violent wind, and that he thought it his duty to return to port with them." The very first ship was captured whilst he was not advancing to *Ireland*, but was

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(a) "You will be pleased to acquaint my Lords commissioners of the Admiralty, that having landed the money at *Plymouth* on the 16th, I sailed from thence on the evening of the following day, and was for four days afterwards kept in the *Channel* by light and variable winds. In the course of the succeeding days, I fell in with, at the entrance of the *Channel*, three large and valuable ships from *Surinam* to *Amsterdam*, and afterwards with the other under neutral flags. Having in my possession intelligence that these ships were loaded at *Surinam* on *Dutch* account, I could do no less than take possession of them, and accordingly exchanged their crews, and sent them to *Portsmouth*. I likewise, in the same period, fell in with some *English* merchant ships and transports, which had been separated from the *Leeward Island* convoy, some so late as the 16th. I was informed by those ships, that the fleet was much shattered by a heavy gale of wind they encountered a few days before. The easterly wind at this time prevailing, I thought it my duty, in pursuance of my orders, to afford all possible protection to these scattered ships that might be dropping into the *Channel*, with the risk of working unprotected against a contrary

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was cruising on a contrary direction for these vessels. Undoubtedly it is not every turn or deviation from a strait line that could be said to take him out of that course; but here was a general acting upon these Admiralty orders, of which Admiral *Kingsmill* was not conscious, and which not only *might be*, but actually *were*, in the event, inconsistent with the execution of the orders of the Admiral; and events followed, which would not have taken place, if Sir *Thomas Williams* had continued to act in conformity to Admiral *Kingsmill*'s orders.

What might have been the rule, if Sir *Thomas Williams* had taken upon himself to act thus, without authority, is a question which does not arise; inasmuch as he had a justifying authority for what he did. Perhaps even, in that case, criminal as the misdemeanor might be, it might be a task of some difficulty to build

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wind, and accordingly did so to the utmost of my power, by seeing some into *Scilly*, and working with others into the chops of the *Channel*; and finally, with a change of wind, accompanied them up the *Channel*; and having so done, I have just anchored at *Spithead*, for the purpose of receiving on board my officers and men, and getting rid of the crews of the said *Dutch* ships.—*Spithead*, 5th October 1796."

Answer from the Admiralty, 6th October.

"I have received, and read to my Lords Commissioners of the Admiralty, your letter to me of yesterday's date, giving an account among other occurrences, of your having detained and sent into *Portsmouth* four vessels from *Surinam* to *Amsterdam*, and of the protection afforded by you to the scattered ships of the *Leeward Island* convoy, and have their Lordships commands to acquaint you, that they have approved of the proceedings on the occasions you have stated.

W. Mordaunt.  
a claim

a claim for the flag-eighth on a capture so made, upon the only foundation, the proclamation ; for, though the wrong-doer might not be suffered to profit by his own wrong, it would not from thence necessarily follow that the commanding-officer, whose orders were *disobeyed*, could maintain a legal claim to his eighth. I do not mean to give any considered and much less a decided opinion upon a question which, relatively to the state of facts contained in the present case, is merely hypothetical, when I say, that possibly the Court might be justified in finding a mode of condemnation, that should consist with the regulations of the prize act, and yet should withhold from the wrong-doer, the benefit of prize taken in violation of his duty.

Upon this view of the case, I advert slightly to some circumstances that have been dragged into the cause; such as, the ordinary route of Sir *Thomas Williams*, or others, which would weigh but little either way; for I do not decide this case upon grounds, that make that a matter of importance. The description of the limits of the *Irish* station, or whether there were then any describable limits or not, is also a matter of no moment; the capture being made on ground which belonged equally to the *Irish* station and to other stations; nor do I attribute much importance to the evidence respecting the practice of the Admiralty, in notifying the detachment of a vessel; without any evidence I should, of course, have presumed it to be the practice, because it is clearly for the convenience of the public service that it should be so; I should equally have presumed, that it is sometimes omitted — sometimes, possibly, from accident, and sometimes on reasonable grounds. In the present case, where the ship was to *rejoin*, I see particular reasons of distinction why it

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might have been omitted; for, if she had not met with these vessels, she might have arrived at the *Iris* station as soon as any other intelligence could have reached Admiral *Kingsmill* from the Admiralty. Upon the whole of the question, which I cannot but consider as one that is very open to discussion, I should have been extremely glad to have fortified my own judgment, by the authority of decided cases: but neither the industry of the Bar, nor my own researches, can furnish me with any case on this particular point. I am, therefore, driven to decide it on principle: Upon principle, I am of opinion, that those captures were made under the orders of the Admiralty, not confirmatory of, nor coincident with, the orders of Admiral *Kingsmill*, but suspending and annulling those orders for the time, and producing captures and events, which would not otherwise have taken place; on these grounds I conceive myself bound to pronounce that Admiral *Kingsmill's* right to the flag-eighth does not exist. At the same time, considering it to be a question of mere right between the parties, fit to be contested, and fairly and liberally conducted, I do not think that I shall incur the imputation of shewing any improper indulgence to litigation, if, in adjudging the whole prize to Sir *Thomas Williams*, I nevertheless decree that Admiral *Kingsmill* is entitled to his expences.

THE WILLIAM AND MARY, DICKSON  
Master.

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THIS was a case of a claim of joint capture, given on behalf of the *Mars* privateer, admitted to have been in fight, and in company, at the time of capture by the *Alert*, 1801.

Joint capture—  
Effect of a re-  
nunciation on the  
part of a cap-  
tain of a pri-  
vateer. if prov-  
ed—not proved  
in this instance.  
Joint interest  
sustained.

On the part of the actual captor, the King's Advocate contended — That the present claim was barred by the act of the master of the *Mars*, who had overhauled the *William and Mary*, but did not seize, and had afterwards deliberately declined to be concerned in the capture, under a belief that the property on board belonged to neutral subjects, merchants of *Portugal*. In the discussion of evidence on this fact, the King's Advocate objected, that the seventh witness had been examined (a) after the publication of the general evi-  
dence in the cause (b).

(a) Aug. 9.

(b) July 4.

The Court asked how this had happened, and what reason could be assigned for it? It was answered by the Proctor, that as long as the depositions had not been seen, it was usually allowed to examine witnesses at any time.

Court. — The term probatory is regularly concluded by the publication, and it is for the Court alone to open the term again, as it may seem fit to its discretion —

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that discretion will be influenced only by two circumstances — by an assurance, that the party has not seen the depositions, and that he was prevented by some cause from examining the proposed witness in proper time. Is any cause alledged why this witness was not examined before.

[It was answered, that there was no particular reason; that he had been examined as soon as he came from *Jersey*, as it seemed material that his evidence should be introduced.]

The Court directed the depositions of this witness not be read or received as evidence.

#### JUDGMENT.

Sir *W. Scott*. — This prize was taken certainly according to the depositions *by the Alert*, but in company with the *Mars*; therefore, if the case had come on upon the preparatory examinations, there can be no doubt but that condemnation would have passed to both. The presence of the *Mars* is mentioned in the depositions, and the society in which both the privateers were sailing, would have been sufficient to constitute a case of joint capture. But *there are* circumstances, undoubtedly, which may take off the effect of *being in fight*, in many supposable cases that might be stated: as, for instance, if it is proved, that in *this* pretended joint captor, there was a positive design not to capture at all. In the present case, the *Mars* had nothing to do but to give a claim, and rely

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on the depositions in preparatory which would *prima facie* be sufficient to establish her interest. Instead of that, an allegation was given in, stating the circumstances of the case with more particularity. In answer, another allegation has been introduced on the opposite side, alledging a total disclaimer on the part of the captain of the *Mars*, to be concerned in the capture.

I am not aware of any case of *that* kind that has come before the Court, so as to obtain a solemn decision, upon the effect of such a disclaimer of all interest in the capture that was going on. On general principles, it seems not equitable, that one, who refused to partake in the risk, should afterwards advance a title to share in the profits. I do not remember any case that will serve as an authority on this point—but, according to the disposition of my present opinion, I think it would amount to a renunciation on the part of the master, and that it would have the effect of binding those under his command, and also the owners, for whom the master must be considered to act. In order to have this effect however, the Court would certainly expect it to be clearly shewn, that such a disclaimer actually passed. It is stated in the allegation, that Captain *Ferguson*, the captain of the *Alert*, went on board the *Mars*, and expressed his intention to seize, alledging a belief that there were no hides at that time in *Portugal* (a), but what had come from the *Spanish*

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(a) The privateer had lately sailed from *Lisbon*.

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settlements; to which Captain *King* made answer, "that he believed they were *Portuguese* hides, and declined to have any thing to do with them." Captain *Ferguson* then replied, that he meant to detain the ship, and if Captain *King* wished to be concerned, the must send some men on board to assist in navigating her into port; to which Captain *King* replied, "he knew the consequence of detaining neutral property, and would have nothing to do with it."

If this had passed, and had been shewn to have passed, there would have been an end of the case, as to the fact; and I have already expressed my opinion upon the law. It is a very precise and full declaration; but I cannot help thinking, that on so material a conversation as this would have been, Captain *Ferguson* should in common prudence, and caution, have taken care to have the fact attested beyond all possibility of controversy. It being commonly known that *the being in sight* is sufficient to establish a presumptive interest, Captain *Ferguson* must have been aware, that he was liable to have this presumption set up against him; and therefore he should have taken care to have something in writing, or to have used a sort of *rogatio testium*, calling on witnesses formally to note the fact with precision, so as to establish it beyond all possibility of doubt. Instead of that, it is impossible not to observe, that here is a very great variation in the evidence on this point. Nothing is proved in detail, that corresponds in any degree with the facts alledged, in the testimony of either of the three witnesses that have been examined — especially on that article of the allegation, which describes the notice given by  
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Captain *Ferguson*, "that if Captain *King* meant to have any share in the prize, he should send an equal number of men on board," which would have been a strong and natural circumstance, if it had been substantiated in proof. There is also great variation and diversity as to the place where the whole conversation is supposed to have passed. The allegation states it to have taken place in the cabin of the *Mars*, but as far as I can understand the witnesses, it is not so represented by them. The first witness takes no notice of it. Another says, "it was in the boat of the *Alert*;" and a third gives a still more improbable account, "that the masters were standing on their respective decks, and held this conversation by means of a speaking-trumpet;" if so, it must have been heard by every person on board the *Alert*; instead of that, there are only three witnesses examined, of whom, the first takes no notice of it, and one describes it to have passed in the boat of the *Alert*.

The whole of this account must be allowed to be stated with great variation, and not in the way, in which a conversation ought to be stated, that was to have so material an effect, as to prevail over the conclusion of law, which would be raised by the combination of circumstances which is admitted to have existed. A conversation by which such an effect is to be produced, should be established in the most satisfactory manner. It is not unworthy of consideration also, that if I give credit to the facts stated in this allegation, I must impute falsehood and perjury to all the witnesses examined on the other side, who all speak in direct contradiction to this account. I have looked into the answers of the party, as I had a right to do,  
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and there I find likewise, that it is positively denied on oath. It is a charge, therefore, that involves all the other witnesses in a wilful misrepresentation and perjury. On this part of the case, I must again recur to what I have, perhaps, already too much laboured, that the party setting up this conversation has not established it with that precision and certainty, which should be required to overrule a settled presumption of law.

It has been contended in argument however, that this account is corroborated by other facts of the case. It is said, that Captain *King* first over-hauled the vessel, and released her. But it appears, that even Mr. *Ferguson* first hesitated, and declined to seize, till finding that all the hides that were in *Portugal*, had come from a *Spanish* settlement, he altered *his* opinion. Then, why may we not suppose, that the same information would have produced the same effect on Captain *King*? Again it is said, that such steps were not taken by Captain *King*, *as would naturally have been taken* by any one, who meant to assert a joint interest in the prize. But I perceive according to the testimony of one witness, that it was the boat *of the Mars* that was sent on board. The boat of the *Mars* was made the instrument of capture, a circumstance which is not altogether without its effect, as shewing that it was under the concerted design of both parties, that the seizure was made. It is farther objected, that no *prize master* was sent on board, nor any other person, to keep possession for the *Mars*. Undoubtedly such a measure would be highly proper, on considerations of interest, and, I might almost say, of duty. It secures the right and participation of agency, and serves as material evidence to shew co-operation. But it is to be

be remembered, that the capture took place late in the evening; that the weather was extremely rough; and that it was not easy to put men on board; which is not denied on the other side. On the next morning the privateers separated: the *Mars* went in pursuit of another vessel, and it was not until her return to her own port, that a claim of joint capture was advanced. — Another argument has been drawn from the delay in instituting proceedings here, till late in the cause. Such delay is certainly improper; but we all know how long parties frequently hang back, sometimes till after an appeal, without affecting their legal interest to share. This objection does not even attach *very* strongly on the present case. How long the cruise continued does not appear; it is asserted by those concerned for the *Mars*, that an intimation was given here of an intention to interpose within three months. Considering the distance at which the fact happened, and the time necessary for communication, I do not think that there have been any laches, from which a renunciation of interest is to be inferred. It is, besides, a strong circumstance, that this intervention was given at a time, when the ship had been restored, and before the admission of a claim for the cargo — when the event was uncertain, and the party might have reason to apprehend the consequence of becoming liable to costs and damages. This circumstance is, I think, strong evidence against any dereliction of the intention to share.

On the whole of the case, I am of opinion that if the allegation had been proved, it would have amounted to a renunciation on the part of the master, and that it would have had the effect of  
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binding his owners and crew; but thinking that the allegation is *not* proved, I shall adhere to the presumption of law, and pronounce for the interest of the *Mars*, as joint captor.

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## SHIPS TAKEN AT GENOA.

Commutation for ships taken at Genoa—Those ships not protected under the terms of the capitulation—farther Question—If Commutation is to be considered as ransom, how far lawful?—and to be condemned to the captors?—*Condemnation to the King.*

THIS was a case arising on a demand made by the merchants of *Genoa*, for the sum of 17,000*l.* said to have been exacted by Lord *Keith*, as a commutation for ships seized in the harbour of *Genoa*, and left behind, at the evacuation of that place by the *British* and *Austrian* forces. After a memorial had been presented to His Majesty in council, the claimants were advised, that the proper mode of proceeding would be to apply to the Court of Admiralty, for a monition on Lord *Keith* to proceed to adjudication. In this form the question now came forward.

*On the part of the seizers, the King's Advocate and Arnold.*—This is a claim for 500,000 *Genoese* livres, paid by the inhabitants of *Genoa*, as a commutation for vessels seized in the port of *Genoa* in 1800. The question for the immediate consideration of the Court is, Whether this money is to be considered as prize; if it is, it will be condemned to the Crown, rather than to the captors, as indeed the captors themselves seem disposed to admit. The present question is, however,

however, Whether it is, at all, condemnable as prize? The money is to be taken as the representation of the ships, and therefore the whole case resolves itself into this single question, Whether the shipping was previously protected by the capitulation that had been entered into between the *British* and *Austrian* commanders on one part, and those who were in the possession of the Government of *Genoa*, at the time when it was surrendered to the combined forces. How does the case stand on the terms of the capitulation? The articles relating to this property, are only the 8th and 9th articles. The 8th article stipulates, "That it shall be lawful for the *French*, *Genoese*, and the *Italians* domiciled, or refugees at *Genoa*, to withdraw themselves, with whatever belongs to them, whether money, merchandise, moveables, or other effects, either by land or sea, wherever they judge it convenient." On this article it is that the claimants principally rely. But it is a well known rule of interpretation, that ships (*a*) are not understood to be included in the most general terms, unless specifically described. They are a species of property, *sui generis*, and are not included by mere general terms, however comprehensive. The language of

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(a) En règle générale, les navires ne sont pas compris sous le nom générique de *merchandise* & de *chose*, parce qu'ils sont des objets assez importants, pour être désignés par la dénomination qui leur est propre. *Valin Traité des Prises*, vol. 2. page 223.

Sub generali rerum vel mercium nomine navis non venit.—  
*Seymannus Jus Marit.* part 4. ch. 7. n. 285, page 455.

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our own Prize Acts bears testimony to this rule of construction, by expressly enumerating *ships* by name among such articles of prize, as may be supposed likely to be captured by the joint operation of land and sea forces. If the question depended upon the construction to be put upon this article, under the ordinary rule of interpretation derived from known usage and practice, the claimants would find a difficulty in maintaining, that they were exempted from the ordinary consequences of capture, which subjects the property of the enemy of all kinds to confiscation, unless protected by particular stipulation.

Other evidence however is not wanting to support the interpretation contended for on the part of Lord *Keith*. Lord *Keith's* affidavit (*a*) has been brought in, describing

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(*a*) Appeared personally the Right Honourable Lord *Keith*, Admiral of the Blue, late Commander in Chief of His Majesty's ships and vessels in the *Mediterranean* station, and referring to the attestation by him made in the cause on the twenty ninth day of *November* last, now further made oath, that after the ships in question, or part of them, had been inventorized by his direction, and the sum which was conceived by his agents to be about their true value, was demanded from the regency, or the persons appearing on behalf of the proprietors thereof, a deputation from them waited on him, this deponent, representing their inability to pay the sum so demanded, and afterwards entered into a negotiation with the agents for the capture on the subject, but the deponent has no recollection of their objecting thereto, on account of its enormity, nor does he believe that they did so, or that any complaint whatever was made to him on the violence or injustice of any orders given by him in respect to the said seizure of the ships

scribing very precisely the sense in which the capitulation was understood. By this affidavit, it appears, that the protection of the shipping in the harbour was expressly introduced into the *proposals* on the part of *Genoa*, but that *he* himself refused to admit it, declaring, in *preliminary*, that he would not consent to

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ships in question, it being a matter of notoriety that the shipping was, by the articles of capitulation, left at the disposal of the conquerors, and that all attempts to exempt them from seizure had been strenuously and successfully resisted by the deponent. And the deponent further saith, that the subsequent reduction of the demand was acceded to, not on the ground of the property having been estimated beyond its real value, but solely as an act of grace and favour to the merchants of *Genoa*, in consequence of their representing that they were unable to raise the real value of the said ships;—that during the negotiations, in respect to the said compensation, the deponent and his agents most probably informed the deputation, that the sum received would be properly secured, and ultimately disposed of as His Majesty should be pleased to direct; and that any just representation that they wished to make would undoubtedly be received; but this deponent expressly denies that he made any promise of restitution of the said compensation to the parties who advanced it, or gave any assurance of its being restored. On the contrary, he this deponent always considered, and now considers the sum received as only a trifling compensation, by no means an equivalent for giving up a great number of valuable ships, which had justly incurred the penalty of confiscation, and conceiving that there would be no hesitation in respect to granting the said sum to the captors, as a gracious reward from His Majesty for their persevering efforts in the reduction of the said city. He presented a memorial to His Majesty in the usual way, and without any secrecy whatever, praying a grant of the said sum accordingly, all which the deponent refers to the best of his knowledge and belief.

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it, or accept the terms, unless it was withdrawn; and in consequence of this refusal, that article was withdrawn. The conduct of the captors is also evidence of the construction, that was put upon this question at the time. Instead of exempting the shipping found in port, they proceeded to take inventories, and acted in all respects with regard to the property found on board the ships, as if they considered themselves to have obtained a prize interest in them.

*On the other side, Laurence and Swabey.*—With respect to the form of condemnation, if the Court should be of opinion that this money is to be condemned as prize, *that* is a question with which the claimants have no concern. If this mode of commutation is considered as *ransom*, which is a thing prohibited and forbidden as illegal, the captors cannot with propriety be admitted to come forward, and maintain a claim arising out of their own illegal act; on that ground, the condemnation ought, perhaps, more properly to pass to the Crown. But that is a question which in no manner affects the claimants. On their behalf it is contended, that this property is *not liable* to condemnation. The facts that respect them, are shortly these: A large sum of money was demanded of the inhabitants of *Genoa* as a commutation for a number of ships, not precisely ascertained, but amounting to about five hundred, at the moment when the *British* forces were in the act of evacuating *Genoa*. It was a measure of the moment, in which they were called upon to decide in twenty-four hours. Under this pressure of necessity

necessity they paid the money : But, as it must be understood, and as it was expressed by Lord *Keith*, they were not considered as debarring themselves by that act from praying restitution, if they could make out a just case. Setting aside this agreement, as not precluding these parties, we must examine the ground of condemnation of this sum of money, by the previous question, whether there was a right in Lord *Keith* to seize the vessels themselves as prize ?

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It is said, on the other side, that we could not under any construction of the first capitulation have obtained restitution of the vessels. On this point the case now rests ; for, as to Lord *Keith*'s affidavit, which has been brought in, it can hardly be received as evidence at all — certainly not until the other parties have had an opportunity of answering it. Then what was the nature of this seizure ? Was it a part of the first act of taking possession of *Genoa* ? So far was it from making a part of the general measures of the combined forces, that it is asserted by us, and not contradicted, that when Lord *Keith*'s intention of taking away the vessels was announced, a deputation of the inhabitants, accompanied by several members of the Imperial Regency (a), waited on him to expostulate against the injustice of the proceeding.

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(a) On the possession of *Genoa* by the combined forces, a Regency was established by the stile and title of the Imperial Provisional Regency, composed of natives of the country, under the presidency of Count *St. Julian*, one of the Generals of his Imperial Majesty.



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It is asserted also on our part, and not contradicted, that, during the intermediate time, Lord *Keith* had continued to supply passports, and to assist the inhabitants of *Genoa* in withdrawing themselves, their property, and effects, agreeably to the capitulation. After this line of conduct, so opposite to a pretension of seizing as prize, on the approach of the *French*, after the battle of *Marengo*, Lord *Keith* prepared to take away with him all the vessels in the harbour of *Genoa*. But from the 4th of *June* to the 19th no act was done that indicated an intention to take possession of this species of property. Till the 19th of *June*, no attempt was made to take possession. When that was done, was there any discrimination of character? None — Ships of all nations were alike included; till by the convention, which appears to have been entered into between Lord *Keith* and the deputies of the *Genoese* Government, on the 19th of *June*; it was agreed, 1st, “That His Majesty’s transports were to be taken away; 2d, That *Genoese* ships of war were to remain as prizes; 3d, That vessels avowedly *French* or *Spanish* were also to be carried off; but, 4thly, That all others, whether actual *Genoese* under their own flag or disguised, were to be released on the Government’s paying 500,000 livres.” Can the sweeping condemnation, which is now contended for on behalf of the *British* fleet, be supposed to have been in the intention of those who were entrusted with the command of the combined forces. On capture, by conjunct operations of land and sea forces, it is by no means a necessary consequence that all the ships in the harbour become prize. Many must be entitled to the protection of a neutral character; and  
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with respect to others, can it not be supposed that the *Austrian* forces, who co-operated to the reduction of *Genoa*, would consent that the *British* fleet alone should have the benefit of so great a booty. It cannot be maintained, that Lord *Keith's* act of seizure was made in consequence of the capitulation, nor as forming a part of the first act of taking possession of *Genoa*.

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What do the words of the capitulation express? The 8th article gives liberty of "withdrawing money, merchandize, or other moveables and effects." Under these terms must be comprehended ships, as well as other articles of property, unless there is something to controul the obvious meaning of the words. Nothing of this kind is averred in any distinct or precise form, but a reference is made to general rules of construction, as if it were a point so obvious and established by practice as to admit of no doubt. On the contrary, we protest against any such rule of interpretation, and deny that any such rule exists, as should exclude ships from being comprehended, with other articles, in general descriptions of property, if it appears to have been agreeable to the intention of the parties, that they should be so included.

But the question is not left on the bare interpretation of these words. The intention of the contracting parties, that ships should be so included, appears still more obvious from the following article, which stipulates for a liberty which would be nugatory, and useless without such a construction. It is there stipulated (a), "that the inhabitants of the town of *Genoa* should be at liberty to communicate with the

(a) 9th article.

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two coasts, [*Rivieres*], and freely to continue their trade." Does not this imply, that they should retain their merchant ships to carry on such a trade? It would otherwise amount to this absurdity, "that you may enjoy perfect freedom of trade, but without ships." On the terms of the capitulation, therefore, it is impossible to contend that the sweeping condemnation now prayed, as the obvious construction of that instrument, can be maintained. If any effect is to be attributed to the affidavit of Lord *Keith*, the claimants expect to have an opportunity of replying to it, before the Court proceeds to ground any decision upon it as evidence in the cause. In the mean time it may not be improperly exposed to some observation. The orders given to Captain *Beavor* appear not to be very consistent with the interpretation now contended for. The orders were, "to make an inventory of the ships, and ascertain such as had entered in contravention of the blockade, that they might be proceeded against according to law." That is intelligible; but it shews a reservation in the mind of Lord *Keith* to proceed only against ships of a particular description—to examine what ships entered in breach of the blockade, what ships were avowedly *French* or *Spanish*, what were vessels of war, and to release the rest, according to what is afterwards stipulated in the agreement of the 19th of *June*. Ships of war, and such as had defrauded the rights of war, it was his duty to detain; but this discrimination, which is afterwards made, is material to shew, that the refusal, which Lord *Keith* is stated to have given to the proposals, must be understood as subject to the

the same reservation. To refuse to include ships of war, or ships entering in breach of the blockade, was right and proper ; but *now* to extend that refusal to all ships, with a view of shewing that the subsequent seizure of all ships was agreeable to the first capitulation, and done as a part of that act, is to bring forward an *ex post facto* explanation, which is contradicted by the course of events that actually took place. On the whole, it is submitted that the Court will not come to a decision unfavourable to the claimants on the present evidence.

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## JUDGMENT.

Sir *W. Scott*. — This cause arises out of the seizure of *Genoa* in June 1800. It now comes on in the naked shape of the admission of the claim on the behalf of the *inhabitants* of *Genoa*, at that time undoubtedly in a state of hostility with this country. There is no suggestion in the claim, that any other persons are aggrieved, than merchants of *Genoa*, who were decidedly *Enemies* ; unless it can be shewn that they had been taken into the protection of this country, and that the seizure was made after the time when they had so become entitled to protection under the capitulation. Undoubtedly, if the seizure was made *after* that time, it would be to be considered, not as the exercise of any rights of war, but as mere lawless rapine and plunder. The question therefore appears to me to respect entirely the time of seizure — If it is shewn to have been before the convention, it will be in exercise of the rights of war ; if after, it will be liable to the description, that I have given of it, of illegal plunder and violence. On this fact, the different parties give different representations — Lord

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*Keith* describes it to have passed *before* the convention; whilst the claimants state it to have been *after* the capitulation, and in violation of the faith of the parties that entered into it.

In the first place, it may not be improper to consider the circumstances under which the seizure was made. All *Genoese property* was subject to condemnation, unquestionably — There is nothing to raise a doubt upon this point. As to other property, I conceive that the Commander in Chief had a right to proceed with respect to *that* also, on a presumption that it was subject to condemnation, as belonging to persons of *Genoa*, leaving it to the owners to shew that it was neutral property — or, since a blockade had been imposed upon the port of *Genoa* for a considerable time, that the particular vessel which was the subject of each claim, and the goods on board had not violated the blockade. The next thing to be considered is the capitulation, in which two articles are principally relied on, as decisive of this question. The eighth article, which grants permission to the inhabitants “to withdraw themselves, their money, merchandizes, moveables, or effects, by sea or land,” — that is, as I understand it, *to withdraw by sea or land*. And the ninth article, which stipulates for the freedom of trade. Now, on the construction of these articles, it has been contended, that it was the intention of the parties to exempt the shipping from seizure; and if the Court was to abstract itself, from the consideration of what has usually been understood and done, the terms are perhaps large enough to admit this interpretation, although it is an acknowledged rule, that *ships* themselves being property of a peculiar species, do not necessarily pass under such a description — It is impossible  
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not to refer to the practice of commanders of other fortunate expeditions, by whom a broad distinction has usually be taken, between property afloat and property on land. In many capitulations this distinction is expressed; and when it is *not* expressed, the terms of the convention must admit some qualification from the usual practice, which, in late wars, has almost invariably been observed.

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That a naval commander should mean to exempt property afloat, would form a particular instance, and such an exception from the general rule, that it is impossible not to attend to this consideration, in judging of the credit to be given to the representation on one side, or on the other. But the question is, what was the interpretation which the convention had received in the understanding of the parties — that is, of the contracting parties? — I do not mean of the merchants of *Genoa*, but of the *French* Generals on the one side, and the *Austrian* Generals and *English* Admiral on the other. If it was the intention of these parties, that the shipping should not be exempted, it will be of little consequence whether the merchants of *Genoa* were apprized of it or not; since they are concluded by the act of those who held the government over them at the time, and are to be reputed capable of binding them by their acts.

If we give credit to Lord *Keith*'s positive declaration, the shipping was not exempted. He states, "that the proposal *was* made, but that it was rejected, and expunged with his own hand." It is said, that this refusal might apply only to ships of war, to which it would have been highly proper for him to refuse any exemption; and that this account does



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not negative the supposition of an exemption being granted to merchant ships — Lord *Keith* certainly does not so consider it. He makes no distinction — and what weighs materially with me is, that no such proposal seems to have been offered on the part of the *French* Generals. On their part no such distinction is proposed ; and therefore it is, I think, to be inferred, that Lord *Keith*'s declaration, “ that he would not suffer the ships to be included in the protection,” must have referred to merchant ships.

Then what followed ! I have already said, that the commander had a right to make a seizure of all ships in port, for the purpose of confiscating all such as were *Genoese* property, and of affording to others their just rights. It is stated by Lord *Keith* that he was proceeding to inventorize and examine the circumstances of the particular ships. A more legal or cautious mode of proceeding could not have been adopted ; and if the seizures were so employed, it is the strongest evidence to convince me that they were doing it with an intention of exercising the rights of capture over them, and for the purpose of bringing to legal adjudication such as should appear liable to condemnation. But it is said, that the ninth article grants “ the freedom of trade,” and that it would be nugatory to grant *that*, and at the same time to seize their shipping. To this observation I can only say, that nugatory as such a clause might be, it is in every day's practice to seize all property afloat, and yet to allow a general freedom of trade, exclusive of such particular seizure. It is admitted that Lord *Keith* executed the capitulation in all other respects with perfect good faith, and it is said, that he continued

nued to give passports. If it could have been shewn, that any passports had been obtained for *ships*, it might have been material as affording a practical interpretation, but no such averment is advanced in the affidavit which has been made to introduce the claim. That no such application was made for the removal of ships is, I think, a strong circumstance to shew, that Lord Keith's hand was upon them from the beginning.

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Finally, after the unfortunate and never enough to be lamented battle of *Marengo*, Lord Keith could no longer continue his examination. — To carry all the ships away was impossible — yet *he had a right to take away the value of all*, as having a right to the possession; and if he was not able to retain the body and substance, he had a right to secure the value in any manner that he could. The sum first demanded was 500,000*l.* sterling, as an equivalent for *all ships* in the port. Remonstrances were made on the part of the *Genoese*; and, in my opinion, naturally enough. For in what respect were the merchants of *Genoa* obliged to contribute for the ships of all the other states of *Italy*? Even with regard to their own, if they had considered that species of property as protected by the capitulation, they might have said — No; take the ships, we are protected by the terms of the capitulation; we will apply to the justice of your Country; we will not ransom them. I do not see, therefore, any thing like that duress or compulsion which has been insinuated; much less were they necessitated to advance money for other ships. If they ransomed for other persons, they must seek compensation from them: They do not *claim* for any persons but themselves; yet they now hold out, that they were under  
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the necessity of ransoming both for themselves and for others.

The contract is, I think, by no means to be represented as an involuntary contract; and when 17,000*l.* was accepted as a compensation for what was admitted to be of the value of 500,000*l.* I cannot but think that that sum can amount to but a small part of what must have been justly subject to condemnation. If the case had been what the claimants state it to be, it might have been proved long ago; it must have been known to the *Austrian* and *French* Generals what were the true intentions of the contracting parties. During the interval of peace it was easy for the claimants to have obtained their testimony, and to have produced *them* to prove "that *they* never intended to confiscate property afloat, and that this is a violent and perverse exposition of Lord *Keith*:" If such persons had given testimony to this effect, it would have been received with great attention. Instead of such evidence, we hear nothing, after an interval of three years, but a bare claim on behalf of persons who, after having had the benefit of the convention, come now to complain for others, as well as for themselves. Under all the circumstances of the case, I think it is a capitulation very much for the benefit of the parties claiming, and one which ought to be supported.

The next question is, to whom is this property to be condemned? Capitulations are certainly of the nature of ransoms, but admitting of very favourable distinctions. Ransoms have been forbidden, as subject to great abuse, being, in the common acceptance, contracts entered into at sea, by individual captors,

tors, and very liable to be abused, to the great inconvenience of neutral trade. But even ransoms, under circumstances of necessity, are still allowed. Capitulations, in their nature, can scarcely become liable to the same objection ; they being contracts between the commander and the conquered State ; on the contrary, they have always been favourably supported, and it is of great importance to the general interests of the captured that they should be sustained.

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I am not aware, however, that the Prize Act authorizes me to condemn *to the captors* in such a case as the present. The act gives them *ships, goods, &c. afloat*. This is a sum of money, which is not exactly of that description of things, though, in some measure, it may be taken as the representation of them. It is to be recollected also, that this was a transaction in which the *Austrian* army was co-operating ; and that there are considerations of a public tendency, which make it highly important that capitulations of this nature should be confirmed by His Majesty : On this view of the question, it will be more expedient, on all accounts, that the condemnation should pass to the Crown. As to the effect of the capitulation, I decide that question upon the merits, and without the slightest hesitation.

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### THE FRANKLIN, GOODRICH Master.

Delivery of proceeds, under restitution, cannot be demanded by the agent of the claimant, in opposition to the principal, or his assignees; though the Court will protect his interest, to the amount of sums expended in prosecuting the claim.

THIS was a question respecting the right to receive restitution of the cargo, which had been decreed on a former day, *viz.* Whether it should be delivered to the assignees of the proprietor, or to the assignees of the person who had given the claim for Mr. Marsden, and had appeared as agent in the cause during the whole proceedings.

*On the part of the agent, the King's Advocate and Laurence.*—The situation of agent is necessarily exposed to great expences. It is of the utmost importance to agents, who are frequently the consignees of the cargo, that, on restitution, the interest of the parties should be placed in a situation as nearly as possible similar to that which would have taken place if no capture had been made. In such a case, delivery to the consignee would have given him a lien over the property. Capture is to be considered as delivery; and therefore the Court would not, by its interposition, make the situation of the agent worse than it would otherwise have been. It would be anxious to leave the parties on equal terms, to discuss their several pretensions before another jurisdiction, where their whole demands might be adjusted: It is on these grounds prayed, that the Court would deliver the property to the assignees of the agent, on bail, to answer any suits that may be instituted; or, at least, that it will not accede to the prayer of the assignees of

the proprietors, and decree restitution absolutely to them.

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*On the part of the proprietors, Arnold and Swabey. —* The circumstances set forth in the petition fully shew the injustice of assigning to the assignees of *Le Souf* the property which belonged to the estate of *Marsden*. It is a known principle of law that agents may at all times be revoked by their principal, on payment of the expences which have been incurred. This is the known condition of agents, and therefore no injustice can be sustained by any parties from the application of this known rule. That Capture is delivery, is a maxim generally received and understood, as a just principle applied to questions of freight, and to some other questions, that may arise in a Prize Court — but it is not to be taken in an unlimited sense, *so* as to introduce all those *pretensions* of *lien*, which might have existed, if the property had got into the actual *possession* of the consignee. All the power of retaining, which this Court would venture to allow to the agent, against his principal, will be confined to such sums as have actually been advanced in prosecuting the suit in this Court — and these have been offered to be paid.

#### JUDGMENT.

Sir *W. Scott*. — When this case came before the Court on a former day, on an application that the proceeds might be granted out to different persons, to the assignees of the proprietor on the one side, and to Mr. *Le Seuf* the agent of the party, on the other,  
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their several pretensions were stated in an Act of Court; and it did appear to the Court then, that if the interest (a) of the assignees had been clearly stated, if they had been sufficiently described as the assignees of the principals composing the firm of *Marsden and Company*, they would have been entitled to restitution.

From the nature of the business, which is transacted in this Court, it must frequently happen that a considerable portion of it will pass under the direction of agents, who may incur considerable expences on that account. This circumstance may reasonably entitle them to the protection of the Court; but this protection must not be incautiously extended beyond the particular species of expences that are incurred in prosecuting the business in the Court. If it should appear that the agent had made considerable advances for such purposes, the Court would be justified in refusing to let the restitution pass the seal, until such advances had been repaid; but as to any other accounts that may be to be settled between the parties, it would be improper for me to cast an eye upon them. Was the Court to entertain such questions, it would assume a jurisdiction which the constitution of the country has not entrusted to it; and from not being habitually acquainted with the principles on which such questions are decided, it would run a perpetual risk of doing injustice between the parties. On

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(a) It was said at that time, that *Marsden* was engaged in different branches of trade, and that it did not distinctly appear that the petitioning assignees were the particular assignees of the firm to whom this cargo belonged.

all questions of this kind, the Court would be guided by the general principle which has been stated : It would restore to the principal, or permit the revocation of the agent, on payment of the advances which had been made, for business transacted in the course of proceedings in the Court. On the former hearing, the Court would have restored to the assignees of the principal, if they had been properly constituted ; but a doubt arose whether they could be so considered ; inasmuch as it did not appear whether one of the parties was involved in the bankruptcy, under which the assignees claim to be entitled. It now turns out, that this doubt was well founded, for he was not involved in the commission ; but he has executed a special power of attorney to these assignees, who of course now have a general authority. Since that time, Mr. *Le Seuf*, the agent, has become a bankrupt, and as such has incurred a total inability to receive the restitution. The prayer which is now made, is, that the property may be delivered *to the assignees of this agent*, on bail being given to abide adjudication. Adjudication in this Court has already passed, and therefore if that is all which is meant, it would be to abide nothing. As to any other suits that may be in contemplation before other Courts, I shall not venture to form a judgment upon them. The trust of agency, with which Mr. *Le Seuf* was for a long time invested, is of a personal nature, and cannot be represented by the character which the assignees bear, as the guardians of his estate. What general claims the estate of Mr. *Le Seuf* may have against Mr. *Marsden*, it is not for this Court to enquire, beyond the necessary advances that may have been made in this cause, and these have been offered

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offered to be discharged. On the whole of this case, I am of opinion that it is not proper that the Court should give a suspensive judgment. It is time that the matter was finally determined. The parties are, *on one side*, merely the assignees of the estate of Mr. *Le Seuf*, who are by no means the representatives of him in his character of agent. — On the other side there are the assignees of the principal, who represent him in every respect, both in authority and interest. I have no hesitation in decreeing restitution to them, on payment of the expences that have been incurred in the prosecution of this claim.

### THE ELSABE, MAAS Master.

Resistance to  
search —  
Swedish con-  
voy.  
Distinction, as to  
the fact of an  
abandonment of  
the purpose  
of resistance  
over-ruled —  
Condemnation.

THIS was a case respecting resistance to search, on the part of the second *Swedish* convoy, detained 7th *August* 1798. The general argument, on the principles applicable to such cases, is already before the public in a similar case (*a*). The particular argument, as to the facts of resistance in this case, is so fully developed in the judgment, as to render it unnecessary to state the arguments of Counsel.

#### JUDGMENT.

Sir *W. Scott*. — I have now to decide on this class of cases; and before I do that, it may not be improper

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(*a*) *Maria, Paulsen*, *supra*.

to say a very few words upon the reasons, which have retarded the determination to this late period. I am not insensible to the inconvenience that the parties may have sustained from delay, nor am I unmindful, as I trust they will readily believe, of the duty of discharging my judicial functions, on all occasions, with due expedition. At the same time, they will recollect not only the magnitude, but the singularity of the question, and the circumstances that are essentially connected with it. It is not unknown to them, that, for a very long period, the final determination of another case, very similar in its nature, had not been given by the Superior Court. It was utterly unknown to this Court, what that determination would be; how far the Superior Court would affirm the principles that had been laid down here—or how far it might, in its superior wisdom, see cause to correct the errors of the first adjudication, both in effect and in principle. Until that was known, it appeared to be a delay not inconsistent with public justice, that this case should remain suspended. After that determination was given, it was a matter of public notoriety, and particularly well known to the Court itself, that negotiations were going on between the two countries, which may, in some views, be considered as the real parties in this litigation; and although these negotiations could not affect the legal merits of this particular case, they might possibly render it unnecessary to pronounce any judgment whatever upon them. During this period, many considerations, both of a public and private nature, concurred to render it inexpedient that any decision should be given.

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These causes have, however, at length ceased: We are now arrived at a time, when every obstruction, to which a just prudence might attend, is removed. The appellate judgment has been pronounced. The negotiations have terminated—and in such a manner, as to leave this Court in full possession of the legal merits of the case. What agreements there may be of a nature merely amicable between the two countries,—how far the one may have deemed it *expedient*, to recede from claims of right, and to substitute indulgent and favourable terms of relaxation, are matters of discretion and prospective policy merely. They in no degree whatever affect the legal merits of this case, and can supply no principle for its decision.

The appellate judgment has affirmed the sentence of this Court, though without reasons, and as it is not unusual in many other cases, in very general terms. To say the least, *it has not shaken* the authority of that decision, as to this Court itself; because the solemn judgment of the Court upon general principles *must* be an authority to the Court itself; inasmuch as instability of principle would be one of the greatest mischiefs that could arise in the administration of any system of jurisprudence. A case may occur, indeed, in which it may be the duty of a Court of Justice to break through the restraint of former authority imposed by itself; but I confess no such feeling attends this case, because I must say, without hesitation, that having considered all that has been said, and all that has been written, on the subject, with the attention due to its importance, I have not felt the slightest inclination of mind

to recede from any principle, on which that judgment was formed.

How far the appellate judgment has confirmed *all* the principles that are there laid down, has been questioned in argument. It is a question, however, into which I do not feel myself disposed, or called upon, to enter very minutely, for the reason already given, that if they are not positively *disclaimed* by the Court above, they continue to bind the legal conscience of the Court below. At the same time, I think it hardly possible to avoid two observations: *first*, That if the principles had been such, as that Court disapproved, it could not but have felt the obligation of disclaiming them. They are principles of considerable extent,—operating on great subjects,—and leading to great consequences; they are not indifferent in their nature, and if erroneous, it should rather seem that public interests called forcibly for a public disavowal of them; *secondly*, That although it is not to be supposed that every incidental expression of opinion, is confirmed by that judgment,—(for this Court is not wild enough to attribute such effect to any appellate judgment, or even to conceive itself bound by such *obiter* intimations), it seems, *ex vi necessitatis*, that the leading and fundamental positions must be considered as affirmed. For instance, it must be taken to be affirmed, that the Court of Prize has cognizance of such a matter—that it is competent to entertain the question—that it is not bound to leave it to the chance of force in this particular instance, or to the chance of negotiations afterwards, between two countries, neutral in law, but hostile in disposition in consequence of such an unnatural occurrence of hostility,

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to the chance of negotiations, I say, which might continue, whilst the same occurrence takes place again, as it would have done in this very instance. *In the next place*, It must, I think, be taken, *ex vi necessitatis*, as affirmed, that resistance to search is penal, and that the penalty is confiscation; *thirdly*, That *that* resistance, being directed to be given by the Sovereign of the State, affords no protection; *fourthly*, That the resistance of the convoying ship is the resistance of the whole convoy; and *fifthly*, That the resistance given in that particular case, was the criminal act which led to the penal consequence. All these positions are not only unshaken, but they are, in my apprehension, bound up in the judgment of the Court of Appeal, and substantially affirmed by it; and if there are any persons who dispute the affirmance on these grounds, they are at least called upon to shew, on what other grounds *it was*, or *could be* affirmed; or how it was possible to arrive at the same conclusion, on any other principles, than those laid down as the foundation of that sentence in the Court below. On the fundamental positions of that sentence, then, by which the justice of the decision must be tried, I do not feel myself disposed to doubt, either from any thing that I have heard, or from any thing which farther reflection has suggested to me, or from the manner in which the opinion of the Superior Court has been expressed upon it.

The fundamental positions of the former sentence being taken as affirmed, it would be only necessary to enquire, whether any such distinction arises in the facts of these cases, as will vary the judgment of the Court upon them. It has been much pressed, as a material  
dis-

distinction, that the commander of this convoy *did not* carry the purpose of resistance into effect ; that it was altogether abandoned, not from any incapacity to resist, but from motives of amity and honorable discretion. A reference has been made on this head, to an opinion of the Court intimated in the former judgment, that “ if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right.” But the difficulty of advancing such a plea, in opposition to the imperative instructions of his own government “ to *resist*,” is also there noticed ; and though I will not say that it is an absolute impossibility that a commander should take upon himself the frightful responsibility of departing from the orders of his Government, I may safely affirm that it is most highly *improbable*, and that every presumption is against it. That a military officer should take on himself to reverse the orders of his Government, to assume the character of a paramount Statesman, and say, “ True it is, you gave me such orders ; but all this is wrong, and I will not carry them into execution,” is the most improbable of all suppositions, and directly contrary to the first rule of his duty, which is obedience. A person acting under such instructions must necessarily suppose, that all considerations of policy had been fully weighed by the State ; and that all that was required from him was a prompt obedience to the orders which he had received — orders, it is to be observed, operating not constructively on any unforeseen emergency arising by surprize, but expressly applying to the very transaction before him — the *casus fœderis*, if I may so say, between him and

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his Government — the express purpose of the command with which he was entrusted.

The very suggestion of an abandonment of such a purpose, sets out with the greatest improbability against it; and therefore it must at least be required to be made out by the most clear and indubitable proof. In the present case, this suggestion is not introduced by any kind of plea, but it is merely taken up in argument, as sufficiently proved by the conduct of the transaction on both sides, and the correspondence which passed between the *Swedish* officer and the commander of the *English* frigate. The *Swedish* officer himself has not ventured to aver that such were his motives. Let us see how the suggestion is supported by the facts which actually took place. The affidavit of the *English* officer, Captain *Ommaney*, gives this representation of the matter: "That on the 7th of *August* 1798, His Majesty's sloop the *Buffy*, of 18 guns, in company with His Majesty's cutter brig the *Speedwell*, of 14 guns, fell in with a fleet of *Swedish* merchantmen in the *North* Sea, under convoy of a *Swedish* frigate of war, of 24 guns: that His Majesty's sloop ran close along-side the *Swedish* frigate, and the deponent having hailed her, enquired where they were bound? That he was answered, they were bound on a cruize; that on the question being repeated, they replied, 'to the *Spanish* Sea;' that at the time he so ran along-side the *Swedish* frigate, he plainly saw that all her men were at quarters, and every thing cleared for action, and the topmasts out of the guns; that on the deponent's informing them that he must examine the convoy, they replied from on board the  
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“ *Swedish* frigate, that their orders were not to permit any *English* vessel to overhaul the convoy; that the deponent perceiving the said *Swedish* frigate cleared for action, informed the people on board her, that if they attempted to fire a shot, he was well prepared to receive them; and that if they did not immediately make a signal for the convoy to bring to, he should immediately commence firing on the several ships of the convoy for that purpose.” Captain *Ommaney* then goes on to state, “ that after conversing a considerable time, and perceiving the *Swedish* commander did not mean to bring to, he said he would fire a shot into the convoy, and that he might relent it if he chose; that the deponent was preparing to put this in execution, when the *Swedish* officer begged he would stop, saying, he would send an officer on board, which he did; that the officer delivered to this deponent a paper writing (a), being a letter from the *Swedish* commander; (c) *Vide inf.* that the said officer said, he saw some boats boarding the convoy, and that the *Swedish* captain had declared, that if they were not recalled he should fire upon them; that the deponent then wrote to the *Swedish* commander, acquainting him that a *British* officer had boarded one of the convoy, who reported that she was bound to *Cadiz*, and had on board spars of sufficient dimensions to convert into masts for men of war, in consequence of which *he would insist* on taking the ship into port; and if the *Swedish* commander did not think proper to proceed with the whole of his convoy into the *Downs*, for the purpose of their being there examined, he should examine them at sea; on which the *Swedish* commander agreed to go into the *Downs*.”

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On this statement of facts, I am to determine whether the acquiescence proceeded only from an inability to resist, or from an assumption of this very hazardous prudence on the part of the *Swedish* commander, inducing him to disobey the positive orders of his own Government, given prospectively for the very case which had occurred. The first fact that may be fairly assumed is, that all opposition was hopeless. The proportions of force are stated, from which, I think, it sufficiently appears even to mere common observation that the disparity was great — But I may still farther rely on the opinions delivered by naval men, which are exhibited to the Court — and on the testimony of the *British* officer, who concludes the particular representation which I have before cited, by asserting his conviction, “ that the said *Swedish* frigate would have forcibly and hostilely resisted the capture and detention of the several ships under her convoy, had the force of His Majesty’s ships been inferior to that of the *Swedish* frigate; and he verily believes that he was prevented from so doing solely by the superiority of force.”

To have declined a hopeless contest is no imputation upon the courage of the *Swedish* officer ; for it was not one of those occasions, if any such exist, in which a man is to devote himself and his followers to certain destruction, without the chance of procuring any benefit to his country : Nor could it justly be deemed a disobedience to his instructions ; for an order to resist force by force, must be understood to imply, that he had a force sufficient to make and maintain resistance ; and if he had not, the order was no guide to his conduct. The contest was useless for protecting  
the

the convoy, and equally useless for exciting the question between the two countries; because a submission compelled by the terror of force, must have all the legal effect that could have been attributed to the most bloody engagement. Suppose the proportions of force had been inverted, and the *Swedish* frigate had possessed an equal superiority, it would have still been equally the duty of the *Swedish* officer, acting upon the considerations of mere amity and prudence, which are ascribed to him, to have declined an engagement; for all considerations of that sort would have remained the same, whatever might have been the relative proportions of force—and if so, then this officer must be supposed to be failing under instructions, which, under any assignable circumstances, he felt it his duty to disobey.

It is a little material, in considering whether this change of conduct took place, to consider a little the time at which it must be supposed to take place. It appears that his ship at first presented herself in a state of preparation for action. There had been abundant time for deliberation during his voyage, but no change of purpose seems during that period to have been produced. On the first appearance the *Swedish* commander puts his ship into a state of hostility: he asserts his orders to resist, and threatens to fire on the *English* boats. This is, I think, very unlike a voluntary deposition and abandonment of the design. A conversation ensues on a matter of etiquette, which has no immediate connection with the question. Then comes the material fact, That the *Swedish* commander continues to act in all respects so much in conformity to his instructions to resist, that Captain Ommaney put

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put his ship about, deeming it necessary to support by force the claim which he had advanced to compel search. He is provoked to make the declaration, that if the convoy were not directed to bring to, he should fire upon them. After this they consent to come into the *Downs*, which is called an amicable agreement. But what is it? The only question on which this sort of treaty could operate, is as to the place in which the search should take place, whether *in the Downs*, or *at sea*; not as to the thing itself, but as to the mode of conducting it, after the *Swedish* commander had been reduced to absolute submission. Looking to the relative *force*, and to the whole of what appears in the conduct of the parties, I cannot but accede to the conclusion expressed by Captain *Ommaney*, that the *Swedish* commander would have resisted the search of the convoy, if the force of the *British* ships had been inferior to the *Swedish* frigate.

Two or three letters have been adverted to; first, the letter from the *Swedish* commander to Captain *Ommaney*, and another written by the same person, after the transaction, to the Admiral of the port. The letter (a) to Captain *Ommaney* is in these terms:—" Being commanded by my Sovereign, the King of *Sweden*, to take under convoy such *Swedish* merchant ships, whose cargoes consist of the produce of his dominions, and as such, being perfectly neutral, ought to pass unmolested by all nations, I give my word of honour that all the merchant ships proceeding under convoy of His *Swedish* Majesty's frigate, have only such goods on board; at the same time I declare, that I have His *Swedish* Majesty's express order, not to suffer any

" of

(a) 7th August,  
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"of these ships to be visited, and if any attempt is made so to do, to repel force by force. I hope no hasty step may disturb the peace of two nations, that have been so long united in the strongest friendship. If contrary to my expectation, this account of the cargoes of the convoy should be doubted, nothing is left to me to do, but to offer to proceed with the same to the Downs, and by the decision of the two Courts have this important controversy settled."

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Now I cannot but think, that when it is said, "I have His Swedish Majesty's express order not to suffer any of these ships to be visited; and, if any attempt is made, to repel force by force;" and then "nothing is left for me to do but to accompany you to the Downs," it is in effect an admission on the part of the Swedish commander, that he was acting under irresistible compulsion. To say, "Nothing is left to me," that is, "nothing in prudence;" "no reasonable option," is, under every construction that I can put upon these words, to admit that he yielded only to a superiority of force; for otherwise, *that very thing was left for him to do, which was enjoined by the express order of his Government*, "he was to repel force by force," the very measure for which he had been preparing, until the contest appeared hopeless, and he was induced under those circumstances to submit.

The other letter, to which allusion has been made, was sent by the Swedish commander to the Admiral in the Downs (a), "Being commanded by His Majesty the King of Sweden, to accompany with his frigate the Ulla Ferfen, to the places of their destination, such Swedish merchant ships as are laden with neutral goods,

(a) August 9th,  
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“ goods, and to protect them from all violence and visita-  
 “ tion, I was convinced from the respect due to His  
 “ Majesty’s flag, that these merchants ships would be  
 “ suffered to pass unmolested under its protection ; so  
 “ much the more as the perfect neutrality which His  
 “ Majesty observes during the present war, makes him  
 “ refuse protection to such goods as are confiscable by  
 “ the existing treaties of neutrality. I have neverthe-  
 “ less had the most unexpected declaration from Cap-  
 “ tain *Ommaney*, who, with two of His *Britannic* Ma-  
 “ jesty’s brig cutters fell in with me in the southern  
 “ part of the *North Sea*, on the 7th of *August* instant,  
 “ that he had received orders to fire upon His Majesty’s  
 “ frigate, if permission was not granted to visit the  
 “ merchant ships under his convoy ; and likewise  
 “ insisted upon bringing one of the said ships into an  
 “ *English* port, because, as he would have it, some  
 “ spars, which had been on board this vessel as spare  
 “ yards or topmasts, ought to be deemed confiscable.  
 “ For this reason, I am come into this Road with His  
 “ Majesty’s frigate and the ships under her convoy.”  
 Is not here a peremptory demand made by the *British*  
 officer, and a hard bargain of necessity submitted to  
 by the other.—Captain *Ommaney* had received orders  
 to fire, if visitation and search was not permitted ; he  
 insists upon visitation ; and for this reason the *Swedish*  
 officer comes into the Roads.

Some reference has been made in an obscure  
 manner to the trial of this gentleman in *Sweden* on  
 account of this transaction. In such a situation, what  
 could have been his defence? Can I suppose it to be  
 this, “ You gave me mischievous orders, and I thought  
 proper to depart from them?” Must it not have

been rather this, "I was compelled by superior force; I declined a hopeless contest, but you have every benefit of resistance by this compulsion which was put upon me? To have attempted to repel force by force under such circumstances, could have led only to the sacrifice of the lives of brave men, who were willing to do their duty, as long as there is any prospect of doing it with utility to the State; but whose lives it became the duty of their commander to preserve from a contest, in which the superiority of force rendered all prospect of success utterly hopeless." Surely this was the natural defence for any man to resort to, and that which is conformable to the facts. Any other defence, would have been folly and treason mixed up together.

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In a matter of this kind, I should think myself guilty of very blameable levity, if I proceeded to pass judgment without feeling a very weighty impression on my mind, from the magnitude of the question. On wrong principles I think I cannot be accused of deciding, because they are principles confirmed by the judgment of a tribunal, which is binding upon me. It is also no small consolation to me to consider, that whatever some particular persons may think of these principles, they are *principles* most conducive to the peace and tranquility of the world; for no worse state of things can be known to the practice of nations in the conduct of their hostilities, than this, that when a country is unfortunately engaged in a war with any other, it must consider itself as unavoidably at war with the whole world.

In applying the principles of law to the facts of this case, I have only the support of my own imperfect judgment. I should have been glad if any such distinctions

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tinctions had been pointed out, as could have justified me to vary the judgment which it is my duty to pronounce—but I can arrive at no such conclusion. When and how this judgment may operate as to its ultimate effect, whose purse may really suffer, is totally foreign to the legal consideration of the matter. To future cases the treaty which has been concluded between the two countries will supply a law. It has been my duty to apply the law, by which these nations were bound before the Treaty, and to which all other nations not parties to the Treaty, continue to be subject. Looking to the whole circumstances of the case, and to the principles which it is my duty to apply, I feel myself compelled to pronounce the same judgment, which I was under the necessity of applying to the former case.

Condemned.

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### THE DESIREE, DEPLANNEY Master.

Flag-eighth, allegation admitted.—*Obj. Elion*, That the *Andromeda* and the ships put under her command by the Admiralty, were to be considered as employed on a *distinct* and *separate service*, and as independent of the station at the Downs, overruled.

THIS was a question on the admission of an allegation on the part of Admiral *Lutwidge*, claiming his flag-eighth in this prize, being a *French* frigate, of thirty-eight guns, captured on the coast of *France* by His Majesty's ship of war the *Dart*.

The allegation stated the appointment of Admiral *Lutwidge* to be Commander in Chief of His Majesty's ships employed in the *Downs*, 29th *March* 1799, " That he so continued at the time of capture : That the limits of that station or command in the *Downs* were always considered to be from the *North Foreland*

land to *Beachy-Head*, on the *English* coast, and from *West Capel* on the *Dutch* coast to *Dieppe*: That His Majesty's ship *Andromeda* was duly placed under his command by the Admiralty, 14th *April* 1800, and so continued to the 2d of *August* following: That on the 18th *April* 1800, Admiral *Lutwidge* ordered a squadron of ships to proceed off *Dunkirk*, under the command of the *Andromeda*, Captain *Inman*: That the *Andromeda* having sprung her bowsprit, was afterwards ordered by Admiral *Lutwidge* to leave the command to the *Babet*, and return to the *Downs*, and on her arrival was sent off to the *Little Nore*, for the purpose of taking on board a bowsprit, with orders then to return to her anchorage in the *Downs*: That whilst the *Andromeda* was at the *Nore*, the Lords of the Admiralty having a secret service to perform against the force of the enemy then lying at *Dunkirk*, did (by orders termed *most secret*, 17th *June* 1800,) inform Captain *Inman*, that they had ordered the fire-ships, *Wasp*, *Falcon*, *Rosario*, and *Comet*, then lying at the *Little Nore*, to put themselves under the command of Captain *Inman*, and directed Captain *Inman* to proceed to sea, and perform such secret service, and return to the *Downs* with the ships and vessels under his command, and to transmit an account of his proceedings to the Admiralty: That Captain *Inman* proceeded from the *Nore* to the *Downs*, and there consulted with Admiral *Lutwidge* about the means of putting the orders into execution, and was by him appointed to resume the command of the squadron off *Dunkirk*, and sailed on the 23d *June* for that purpose: That on the 24th *June* the Admiralty sent a message to Admiral *Lutwidge*, requiring to be informed

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formed if he had received any intelligence from Captain *Inman*, and that a correspondence ensued between Admiral *Lutwidge* and the Admiralty respecting that service: That on the 25th *June* Admiral *Lutwidge* did, in consequence of an application from Captain *Inman*, and with *permission of the Admiralty*, dispatch the *Teazer* and *Boxer* gun-brigs under his command to join Captain *Inman*, and by them sent a letter to Captain *Inman*, directing him that in case the vessels that were to join from the *Nore*, should not pass through the *Downs*, he should deliver to them the inclosed orders, first filling up the names, directing them to put themselves under his command: That such a practice of issuing blank orders to be filled up by an inferior officer is not unusual: That in consequence of these measures, the force under Captain *Inman* did proceed to attack the force of the enemy in *Dunkirk* Road, and finally succeeded in capturing the frigate in question: that a communication respecting the capture was immediately made to Admiral *Lutwidge*." The allegation concluded by asserting, Admiral *Lutwidge*'s right, by virtue of the premises, to his flag-eighth in the prize, as captured by ships under his command.

*On these facts, the King's Advocate and Arnold contended*—That it was not to be considered as an expedition under the command of Admiral *Lutwidge*; that the orders of the Admiralty were not communicated to Captain *Inman*, *through* Admiral *Lutwidge*;—that Captain *Inman* was to be considered as detached from his former station by these immediate orders, and as being employed on a distinct service.

*On*

*On the other side, Laurence argued — That the capture was made by ships under the command of Captain Inman, who acknowledged himself to be at the time attached to the station of Admiral Lutwidge, and to be acting under his command, and who did not oppose the Admiral's claim of the flag 8th: That the actual capture was made by the Dart, originally part of Admiral Lutwidge's squadron: That although Captain Inman was a short time under the orders of the Admiralty only, with respect to this service, he did in passing through the Downs receive his orders from Admiral Lutwidge, to resume his former command over the squadron off Dunkirk; and that the actual capture was made on that service, by one of the ship, so put under his command by Admiral Lutwidge.*

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## JUDGMENT.

Sir Wm. Scott.—If the claim for the flag eighth should not be admitted in this case, it would, I think, constitute, in more respects than one, a very singular state of facts. It would, in the first place, be an extraordinary circumstance, That a vessel should be acting under the orders of an Admiral, and yet *that other vessels* acting under *that* vessel, should not be considered as subject to the same command; — and 2dly, That the actual captor should be a vessel avowedly under the authority of the Admiral, and yet that other ships, who are only parties in the cause, as affording constructive assistance, should, by their presence, produce the effect of dissolving that connection, and defeat the claim of the flag eighth, which is founded upon it. I will not lay it down absolutely, that notwithstanding these apparent inconsistencies, such a state of facts might not by possibility



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possibility exist, and perhaps, in some cases, (for I will not assume to predetermine such a point under all possible cases) *justly* exist; but all the evidence strongly disposes me to conclude, that no such facts existed in the present instance. It appears that after Captain *Hyman* was appointed to this particular service, by the Admiralty (*a*), he did not consider himself as detached from Admiral *Lutwidge's* station, at any time. *Before the capture*, he undoubtedly communicated with him; and he returns to his former command off *Dunkirk* under the Admiral's express orders (*b*). The Board

Most secret,

17th June 1800.

Wasp,  
Falcon,  
Rosario,  
Comet.

(*a*) Having ordered the commanders of His Majesty's fire ships named in the margin, to put themselves under your command, and follow your orders for their further proceedings; you are hereby required and directed to take them and the said ships under your command accordingly, and putting to sea so soon as the *Andromeda* shall be ready, and wind and weather will permit, proceed as expeditiously as possible off *Dunkirk*, and on your arrival there, use your best endeavours to take or destroy the frigates and other ships belonging to the enemy, which you may find in *Dunkirk Roads*; and having so done or found it impracticable so to do, you are to repair with as little delay as possible, with the ships and vessels under your command to the *Downs* for further orders, transmitting to our secretary an account of your arrival and proceedings.

Mem.

23d June 1800.

(*b*) It is my direction that you proceed in the ship you command, and resume your station as senior officer of His Majesty's ships and vessels employed in watching the enemy's ships off *Dunkirk*.

And should you in your way thither meet with the *Vigilante* hired lugger, charged with any dispatches for me from Captain *Mainwaring* of the *Babet*, you are to open and peruse them, and afterwards send them forward by said lugger,

S. L.  
of

HIGH COURT OF ADMIRALTY.

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of Admiralty corresponded with Admiral *Lutwidge* upon the subject; and the whole conduct of the Admiralty, and of the several parties manifestly supports the conclusion, that Captain *Inman* himself seems to have formed. I cannot but think that Admiral *Lutwidge*'s authority is to be considered as continued over all these ships, and as operating upon them through the instrumentality of Captain *Inman*; who thought himself throughout the whole transaction, under that command, and is confirmed in that opinion by the Admiralty. Considering the authority of Admiral *Lutwidge* to attach on this capture, I must pronounce this to be an admissible allegation.

The  
DESIRE.

Dec. 13th,  
1803.

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ORDER

ORDER OF THE COURT.

That in all cases where the ships of the enemy shall be burnt, sunk, or destroyed, and where proceedings are instituted, merely for the purpose of obtaining the bounty money ; only one witness shall be examined, and that no copy of the interrogatories be returned annexed to the deposition of the witness.

*Ordered,* — That the same rule be observed in the cases of captures of small privateers under fifty tons.

W. SCOTT.

*Aug. 5, 1803.*

## A P P E N D I X.

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### A.

**O**WING to the long continuance of the late war, and the success of the *British* arms, in all the operations that were directed against the colonial possessions of the Enemy, the cases depending on the interposition of neutral merchants in the colonial trade, have been beyond example numerous, and particular in their kind.—As very many of these have occurred before the Court of Appeal, and as these decisions are not likely to find their way to public notice, as authorities applied to any cases now remaining to be reported in the Court of Admiralty; it may not be unacceptable to those, who are interested in prize questions, to be made acquainted with what has passed on those topics, in the form of a note annexed to these reports.

Since the consequences of the colonial system have formed so important a source of wealth and prosperity to the maritime states of *Europe*, the general principle applied to cases of this description has been, *that the fundamental maxim of the trade being founded on a system of monopolizing to the parent state, the whole trade, to and from her colonies in time of peace; it is not competent to neutral states, in time of war, to assume that trade on particular indulgences, or on temporary relaxations arising from the state of war—that such a trade is not entitled to the privileges and protection of a neutral character.* The application of this general rule, however, has from time to time been qualified by some relaxations: It is upon the extent and legal effect of these relaxations, rather than on the existence, or fitness of the general principle itself, that the various discussions, which have taken place on these subjects, have principally been employed.

During the war between *England* and *America*, and the several powers of *Europe*, that interfered to foment those differences, the principle was altogether intermitted—and on this ground, that *France* had professed, a short time before the commencement of hostilities, to have *altogether* abandoned the principle of monopoly, and meant, *as a permanent regulation*, to admit neutral merchants to trade with the *French* colonies in the *West Indies*. The event proved the falsehood of that representation; but for a time the effect was the same: The Court of Admiralty of this country, did not, during that war, apply the principle, or interrupt the intercourse of neutral vessels in that branch of commerce, more than in any other.

(a) Nov. 6.  
1793.

Soon after the commencement of the late war (a), the first set of instructions that issued, were framed, not on the exception of the *American* war, but on the antecedent practice, and directed cruisers “to bring in for lawful adjudication, all vessels laden with goods, the produce of any colony of *France*, or carrying provisions or supplies for the use of any such colony.” The relaxations that have since been adopted, have originated chiefly in the change that has taken place, in the trade of that part of the world, since the establishment of an independent government on the continent of *America*—In consequence of that event, *American* vessels had been admitted to trade in some articles, and on certain conditions, with the colonies both of this Country and of *France*.—Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in time of peace. The commerce of *America* was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the *American* government to this effect, new instructions to our cruisers were issued, 8th Jan. 1794, apparently designed to exempt *American* ships, trading between their own country, and the colonies of *France*. The directions were, “to bring in all vessels laden with goods, the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe.”

In consequence of this relaxation of the general principle in favour of *American* vessels; a similar liberty of resorting to the col-

cial market for the supply of their own consumption, was conceded to the neutral states of *Europe*. To this effect, a third set of public instructions issued 25th *January* 1798, which recite, as the special cause of farther alteration, "*the present state of the commerce of this country, as well as that of neutral countries,*" and direct cruizers "*to bring in all vessels coming with cargoes, the produce of any island or settlement of France, Spain, or Holland, and coming directly from any port of the said islands or settlements, to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships (a), belonged.*"

Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy, and their own country:—a concession rendered more reasonable by the events of war, which, by annihilating the trade of *France, Spain, and Holland*, had entirely deprived the states of *Europe*, of the opportunity of supplying themselves with the articles of colonial produce, in those markets. This is the sum of the general rule, and of the relaxations, in the order in which they have occurred. On the effect and extent of the law, to be extracted from the rule and the exceptions taken together, much argument has been displayed, and several important judgments have been delivered.

On the illegality of the trade *between the colony, and the Parent State of that colony*, a solemn decision had been pronounced in the Court of Admiralty, in the case of the *Immanuel*, Nov. 7, 1799, 2 *Adm. Rep.* p. 186. In that case, the judge entered much at length into the nature of colonial establishments, and adverted to the prohibition intimated in the first instructions of 1793, as the Rule, *to be applied* in all cases, which did not fall within the reach of any relaxation. In that instance, a cargo taken in at *Bourdeaux*, to

(a) The port of the country of the vessel is here only mentioned. The Court of Admiralty has, however, allowed the benefit of the same rule, to cases of a neutral vessel of one Country, going from an enemy's colony to the port of the owner of the cargo, being also a neutral port. *Rosalie and Betty*, in 2 *Adm. Rep.* p. 343., and other cases.

## APPENDIX.

be carried to *St. Domingo*, as asserted, on the actual account and risk of neutral merchants, was condemned on the question of law. And in the case of the *Rose, Young*, from *Holland* to *Guadeloupe*, which happened on the same day, a trade between the country of one belligerent, and the colony of an allied enemy, were held to stand on the same footing (a).

In the variety of cases transmitted to the Court of Appeal, from the Courts of Vice-Admiralty, other questions have arisen, which have carried the discussion of this subject considerably farther.

The leading judgment that has been delivered on these questions, in the court of Appeal, was in the case of the *Wilhelmina*, *Otto*, 26th Nov. 1801.—A *Danish* vessel, taken *July* 1798, on a voyage from *La Guayra* to *Leghorn*, and carrying a cargo of colonial produce, claimed for merchants of *Bremen*. From the discussion of this case, may be stated most of the topics of argument, applicable to the general question.—*On the part of the Claimant*, it was contended, that whatever authority might be ascribed to the decisions in the war of 1756, they did not by any means determine the question now before the Court.—*They* were cases of neutral vessels going to the colonies of *France*, at first under special licences, and certificates of permission from the government of *France*; which rendered them liable to be considered as adopted *French* ships. Though the same course of decisions continued during that war, after the licences had been laid aside, it was on the same view of things, that the fact of *special permission* was equally notorious: the trade itself being in direct departure from the restriction, which had heretofore invariably excluded all foreign vessels from the colonial trade of *France*. It was therefore a rule, not laid down at that time so broadly, as to comprehend all trade with the colonies of the enemies generally, but founded on

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(a) Under this principle must be reckoned, the trade between the settlement of one enemy, and the colonial possession of an allied enemy. The *New Adventure*, *Lords*, Nov. 26, 1801, being the case of an *American* ship and cargo of slaves, taken on a voyage from the *French* settlement of *Goree*, to the *Havannah*. Condemned. Also the *Oxolm*, *Lords*, 11th March 1802.

the special fact of the previous restriction of the *French* system. From this circumstance arose a material distinction, in favour of the present case. No such restrictions have been shewn to be common to the colonial system of *Spain*: On the contrary, in that same war, a class of cases were uniformly restored, in which, produce brought *immediately* from *Monte Christi*, was proved to have come *originally* from the *Spanish* parts of *St. Domingo*, while the produce, taken from the same place of general deposit, but coming *originally* from the *French* possessions, was condemned. So long ago, therefore as the war of 1756, neutral traders appear not to have been precluded from purchasing the produce of the colonies of *Spain* in the *West Indies*. In the same manner, before the date of the present hostilities with *Spain*, a direct intercourse had been permitted to *English* vessels, and ships of other nations. The fact, therefore, on which the old rule is founded, totally fails. A material difference presents itself also, in respect to the motives, under which the rule has been established.—Originally, the pretensions to *exclude all neutrals*, was uniformly applied on the part of the belligerent; by which, the effect of reducing such settlements, for want of supplies, became a probable issue of war: *now*, since the relaxations have conceded to neutral merchants, the liberty of carrying thither cargoes of innoxious articles, and also of withdrawing the produce of the colony, for the purpose of carrying it to their own ports—*now*, to restrict them from carrying such cargoes *directly to the ports of other neutral states*, becomes a rule, apparently capricious in its operation, and one of which the policy is not so evident. From the Northern nations of *Europe*, no apprehensions are to be entertained, of a competition injurious to the commercial interests of our own country. To exclude *them* from this mode of traffic in the produce of the enemy's colonies, is to throw a farther advantage into the hands of *American* merchants, who can with greater ease import it first into their own country, and then send it on by *re-exportation*—a course of trade which affords no means of detecting, whether such re-exportation is in fact, a fair transaction, originating in fresh speculations on commodities already (a) imported, and become part of the national stock

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(a) The means of ascertaining the truth and fairness of such importation, is a matter exposed to considerable difficulty. Cases on this subject are, *The Polly, Lasky*, 2 *Adm. Rep.* page 361, *The*



stock—or whether it is only a fraudulent mode of concealing the continuance of the first *illegal* destination.

Taking the present case, therefore, to be entirely beside the principle of those precedents of 1756, and free from any mischief intended to be guarded against by that train of decisions.—Putting these precedents out of the question,—From what quarter is the law of condemnation to be derived? In the *American* war, no obstruction was given to a free trade with the colonies of *Spain*. The instructions which have issued during this present war, contain no such rule; in those of 1793 and 1794, the *Spanish* colonies were not mentioned; those of 1798, are scarcely applicable to this transaction, in point of time, but even *they* prescribe no rule of condemnation to the Court. They direct only “the bringing in,” leaving it to the Court to apply the rule of decision, that should be fairly deducible from the law of nations.—No such rule has ever yet been applied to trade with the colonies of *Spain*. If it were deemed fit and proper to establish such a rule, it is equitable, at least that there should be some notification, before it can be enforced to the confiscation of valuable property—which neutral merchants may reasonably think themselves at liberty to employ in a trade, not pronounced illegal, either by public declaration, or by the antecedent practice of this Court.

*On the part of the Captors.*—The question in this case, is, whether the ship and cargo were engaged in a lawful trade—being taken on a voyage from the colony of *Spain*, to a port in *Europe*, not being a port of this kingdom, nor of the country, to which either ship or cargo belongs? If that cannot be maintained, the penalty of confiscation will follow, not from any particular instruc-

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*Mercury, Lords*, 13th Jan. 1802, an *American* vessel, bringing a cargo of produce from the *Havannah*, merely touching in *America* for fresh papers, without landing the cargo, or paying duties, and sailing again on a voyage to *Hamburg*.—Ship and cargo condemned.

The *Eagle, Weeks*, an *American* ship from *Bilboa* to the *Havannah*, laden with a cargo of bar iron and nails, *Lords*, May 18th, 1802. The ship had touched at *Philadelphia* for repairs;—the cargo had been entered for *exportation*, and had afterwards been taken on board again.—The Court directed further proof to be made of the nature of the *importation* into *America*.

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tion, but under the general law of nations; which, when it has distinguished what is an unlawful trade in time of war, inflicts the penalty of confiscation, as the sanction by which alone the principles of that species of law are to be enforced. If it were by the instructions alone that this question was to be decided, there might be some ground for demanding, from whence the penalty of confiscation is derived; since they make no mention of it. The important fact however is, that the instructions *do not constitute the law*; they have none of the characteristics that would accompany them, if they had been so intended; they neither specify the punishment, nor describe the several situations, to which the penalty of confiscation has been already applied; they contain nothing relative to a trade to the colonies,—which has, however, both in this Court, and in the Court of Admiralty, been considered as falling equally within the penalty of the law; 2d Adm. Rep. p. 208; The instructions are *not* circulated to foreign states by general notification, nor even delivered to our own cruizers; they are, therefore, manifestly deficient in the essential qualities of a law, and are to be taken only as so many declarations, of the degree in which the Executive Government is, from time to time, disposed to remit some part of the full right, accruing under the general principle of law. To what then can the court look for its authority on this subject, better than to the decisions of this Board, on the very same question presenting itself, in the war of 1756. At that period, there were no instructions, in which the principle was laid down; yet then the Court did not hesitate to come to a conclusion, on the illegality of such a trade.

The general rule, that neutrals cannot legally trade to the colonies of belligerents, is indeed deducible, from the most clear and admitted principles of the law of nations.—A belligerent has a right, so far as his enemy only is concerned, to distress, and even to annihilate, the commerce of the enemy. That right is, however, restricted by another, belonging to neutral nations, viz. the right to carry on *their accustomed trade*. But the colonial trade being a branch of commerce, from which neutrals are excluded in time of peace, they can suffer *no* injury, by not being allowed to engage in it during hostilities. On the contrary, it is their known duty to abstain from such a trade; inasmuch as it is an obvious and undoubted principle of general law, that neutrals are not to interpose in war, so as to afford to one enemy a manifest aid or relief from

the pressure of his adversary—*hostem hosti imminenti eripere*. This is as an *admitted principle*, in respect to its intrinsic fitness and propriety, whatever difference of opinion may sometimes arise, as to the particular circumstances, which are necessary to warrant the application of it. In many instances indeed, it may be difficult to discriminate between the trade assumed by neutrals in *consequence of war*, and the ordinary state of their commerce. But the universal principle of restriction, on which the colonial system of *Europe* is built, puts the question of fact on this point beyond all doubt.

The principle of monopoly (a) is as evident and notorious as the existence of the colonies themselves. If, under this system, neutrals  
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(a) The system, which has prevailed amongst the nations of *Europe*, of holding their colonies *incommunicable*, (as it is expressed by Governor *Pownall*), is so notorious, that it may appear superfluous to refer to any particular authorities, especially those of a remote period. It may, however, be not altogether without its use, to collect some of the more public expressions of this general policy, which tend to make it in some measure a part of the relative system of *European* politics, and as such, more fit to become the foundation of a principle of public law. In the very commencement of these establishments on the part of *Spain*, in 1506, when the *Indis House* was first established at *Seville*, the trade appears to have been kept principally in the hands of Government, with leave however to native *Spaniards*, and even to foreigners in partnership with native *Spaniards*, to send merchandize to the *West Indies*, in Spanish bottoms only.—*Anderson's History of Commerce*, vol. i. p. 334. In 1539, security was directed to be taken at *Hispaniola*, "to enter the cargo at *Seville*."

(a) 1648.

At the treaty of *Munster* (a), Mr. *Barnage* says, "The commerce of the *Indies* occasioned greater difficulty; The *Dutch* demanded an entire liberty of trade to all in the possessions of *Spain*. But it was objected, that such a liberty would be contrary to the laws of *Spain*; that not only *strangers* were excluded from this commerce, as in their treaties with *England*, but even many of the subjects of *Spain*—namely the inhabitants of the provinces of *Italy* and *Flanders*. It was at last agreed, that the exclusion should be reciprocal, that the *Spaniards* should not trade to the places in the *East* and *West Indies*, in the possession of *Holland*;  
and

are without injustice, and without complaint on their part, rigorously excluded in time of peace, on what ground can they claim to be admitted in time of war, merely in consequence of the distress felt, or apprehended, from the arms of the adversary? The produce of the colonies has become a most important article of

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and that the *Dutch* would submit to the same restraints. *Annales des Prov. Unies*, Vol. i. p. 56. Vide also the *Treaty of Munster*. There was also a *Spanish* Ordonnance 22d June 1673, by which it is declared, "that such as should make invasion, or trade without licence in the ports of the *Indies*, should be proceeded against as pirates." *Polit. Reg.* p. 211.

So in the assiento treaty between *France* and *Spain*, there was also a special clause, for the admission of "such merchandize into the ports of the *Spanish* colonies, as should be taken prize in those seas from the enemies of *France*. Slaves, so taken, might be sold as part of the number under agreement. But merchandizes of other kinds, which were always prohibited, were to be sent to *Carthage* and *Porto Bello*, to wait till the public fairs, and there to be sold under the inspection of the public officers of the *Spanish* government." *Abren.* 302.

By a treaty between *England* and *France*, A. D. 1686. "The subjects, inhabitants, &c. of each king, shall abstain from trading or fishing in any of the *American* possessions of the said kings, and ships found trading contrary to this agreement, shall be confiscated together with their lading. *Collect. of Treaties*, 1732. Vol. i. p. 246.

In the Treaty of *Utrecht*.—"There shall be reciprocal and perfect liberty of navigation and commerce, through all the dominions of *England* and *France*, in *Europe*." *Ibid.* v. 344.

In the ordinance of *France* 1720.—*Le Roi estant informé que le commerce étranger continue dans quelq'unes de ses colonies, non obstant les defenses, que ont esté faites par différentes ordonances et règlements, et notamment par celui du 20 Aout, 1698; et desirant empêcher la continuation de ce désordre, et conserver en entier à ses subjects le commerce de toutes ses colonies, Ordonne, Sa Majesté à tous ses officiers capitaines commandant ses vaisseaux, de courir sur les vaisseaux, barques et autres batimens de mer, tant François, qu'étrangers faisant le commerce étranger à ses colonies de l'Amérique, les réduire par la force des armes, et de les prendre et emmener dans l'isle la plus prochaine, &c. Codes des Prises, v. 2. p. 1174. 1188.*

national

national resources, to nations possessing such establishments : The supply to be afforded to the colonies, is also *essential* to their preservation. The interruption of this intercourse operates to destroy these resources, as well as to compel the surrender of these possessions, in which it is that maritime States are most vulnerable. Out of this distinguishing and peculiar character of the colonial trade, the general principle has grown, that neutrals are not at liberty to interpose in it in time of war. But it is said, "*there have been relaxations*, and it is therefore not to be inferred, that the old system would be again resumed, without notice and public declaration." *On the contrary*, the *old Rule* is to be taken as the standing principle, from which no relaxations are to be presumed, or extended, beyond the fair meaning of the terms in which they are conveyed. The relaxation as to *France*, during the *American* war, stood upon the peculiar ground of an asserted change of system, which proved afterwards to be but a fallacious and temporary expedient (a). As to the *Spanish* colonies in that war, *Spain* was scarcely engaged in the war long enough to bring them under consideration. In the present war instructions have issued imparting a measured relaxation of the principle, as far as particular considerations seemed to require : Since none of those extend to the permission of a trade like the present ; the consequence will be, that this transaction deriving no protection from any of the instructions, falls back into the general law, and is by that subject to condemnation.

The Judgment of the Court was delivered by the Lord Chancellor, to the following effect :—The question in this case has been accurately stated to be, *whether the ship and cargo were taken in a lawful trade, going from a colony of Spain to a port of Europe, not being a port of this kingdom, nor of the country to which either the*

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(a) In the same manner, after the termination of the late war, so early as 21st Dec. 1801, public notice was given at the *Havannah*, and circulated in the *American* papers, "That neutral traders would no longer be admitted into that port." See also, a letter of the intendant of *Louisiana* to the *American* States 16th Oct. 1782.—"As long as it was necessary to tolerate the commerce of neutrals, which is now abolished." *Polit. Regist.* vol. ii. p. 34.

*ship or cargo belongs?* In the course of the discussion, some observations have been thrown out upon the policy of applying any restrictions to such a trade.—But the question for this Court to consider is, not whether the executive Government has done wisely in restraining the relaxations within certain limits, but whether, by the law of nations, this ship and cargo, not falling within the reach of these relaxations, are liable to confiscation. It has been disputed also, “whether by the colonial system of *Spain*, a foreign merchant might not have been permitted to engage in such a trade in time of peace.” On this fact, the Court is disposed to hold it to be notorious, that such trade would *not* have been allowed. It was the duty, of those proposing to derive any benefit from any such a permission, to have proved it to have existed: That not having been done, the Court thinks itself justified in holding as a notorious fact, that such a trade in time of peace would not have been permitted.

The question is then, Whether property taken in such a voyage is liable to confiscation? It has been repeatedly determined at this board, *That neutrals are not at liberty to engage in a trade with the colony of the enemy in time of war, which is not permitted to foreign vessels in time of peace.* Although the instructions of 1793 could not be said to make property so engaged liable to confiscation, if it were not so by the general law; it will not be too much to attribute to those instructions, to say, that they are to be taken as proof, that the Government of this Country understood such to be the law of nations, at the time when these instructions issued. From the conduct of *France* also, in opening the ports of her colonies a short time previous to the breaking out of the *American* war, for the purpose of avoiding the application of this principle, it is manifest, that the principle itself was thoroughly understood, by that Government, to be agreeable to the law of nations.

Taking the rule then to proceed from a known principle of public law, the question will be, whether there have been any such relaxations of the general rule, as will embrace the circumstances of this case. To the practice of the last war, it is needless to advert, since *that* rested solely on the peculiar circumstances, which have been before hinted at, in the conduct of *France*. If any protection can be derived from the instructions of the present war, it must be from those of 1794 or of 1798. If *neither* of these can be said to apply, the consequence will be, that the case, falling under the general rule, will be liable to confiscation.

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By the instructions of 1794, it is not easy to conceive how any protection can be afforded to this cargo. It has indeed been urged in way of argument, that the colonies of *Spain* are not mentioned in those instructions. On that circumstance it is observable, as far as it can be thought to operate favourably for the present case, that it was at least obvious to expect, that the same principle which was applied to the colonies of *France*, would also be applied to other countries becoming enemies, and holding colonies and settlements of a similar nature—Without dwelling however on that argument, it is more important to observe, that it is not the instructions which impose the penalty of confiscation—They only direct cruizers to bring in “for legal adjudication,” and then the question arises—*Whether under the law of nations, the penalty of confiscation does not attach.* If the instructions of 1794, do not protect property taken in such a course of trade; If those of 1798 are to be referred to, they expressly direct, “*the bringing in of ships, coming with the produce of any colonies or settlements of France, Spain, or the United Provinces, to any port of Europe, not being a port of this kingdom, nor a port to which the ship belongs.*”

This is the case of a *Danish* ship going from *La Guyara* to *Leghorn*, with a cargo the produce of the *Spanish* settlement, and claimed for merchants of *Bremen*. It is, therefore, a case not included in the relaxations of either of these instructions, but falling under the general law. It has already been pronounced to be the opinion of this Court, that, *by the general law of nations it is not competent in neutrals, to assume, in time of war, a trade with the colony of the enemy, which was not permitted in time of peace*; and under this general position, the Court is of opinion, that this ship (a) and cargo are liable to confiscation.

On

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(a) On this part of the judgment, it is to be observed, that the terms apply as well to the ship as to the cargo; and in the printed case of the appellant, the ship was by mistake represented as *condemned*, and as forming part of the appeal. In the sentence of the Court below, however, the ship was restored, and there does not appear to have been any appeal from that part of the sentence, on the part of the captor. So, in the case of the *Jonge, Thomas*, *Lords, Nov. 1801, 3 Adm. Rep. p. 233*, although the terms of the

Court

On the authority of this decision, several cases (1) were determined of similar voyages, subsequent to the instructions of 1793. At the same time a class of causes was reserved for farther argument, in which the whole transaction had taken place, prior to the issuing of the instructions of Nov. 1793. In the case of the *Charlotte, Coffin*, an American vessel, taken on a voyage from Cayenne to Bourdeaux, October 1793, this matter came again under discussion. On the part of the claimants it was argued, that, however sound the principle might be, of not permitting neutrals, in time of war, to engage in any trade with the colonies of the enemy, which was not permitted in time of peace; it was not so obvious and known in practice, as to fix on neutral merchants an obligation of presuming, "that it would necessarily be re-established at the commencement of this war" in opposition to the intermediate practice, that had prevailed. Vessels engaging in such a trade, prior to any declaration of the intention of the Belligerent, stood on a much more favorable footing, than those so employed after the instructions of 1793; since those instructions conveyed an admonition to neutral merchants, to abstain from such a trade as was then marked out, as a just cause of seizure at least. On this distinction it was contended, that, considering the changeable ground on which the principle was first established in 1756,

(1) Volant, Bessom, and other cases, Dec. 1801.

Court were general, attaching as well on the ship as on the cargo, yet that voyage having been of ambiguous origin, commencing at Amsterdam, but touching at Embden, it was not precisely a judgment on a ship going singly from a neutral country to the colony of the enemy. Owing to these circumstances, in the *Nancy, Benjamin*, Dec. 19, 1802, an American ship going from La Guyara to Hamburgh, it was for some time disputed, whether the Court had, in any precedent, pronounced the penalty of confiscation on the ship, in such a voyage; or whether the favourable distinction admitted by the Court of Admiralty, in the *Minerva*, 3 Adm. Rep. p. 232, was not to be applied. The Court was strongly impressed with a notion, that the penalty had been enforced, holding it clearly to be within the same principle. In adverting to other (a) cases determined after the *Wilhelmina* on the authority of that case, it appeared, that in several the ship had been condemned. The principle was accordingly understood to extend to the ship as well as the cargo.

(a) Volant, Bessom, Dec. 1801.

and



and the apparent abandonment of it during the last war, there was enough to entitle the claimant to the benefit of a justifiable ignorance, to protect this property from confiscation.

On the other side, it was contended, by arguments which have been consolidated in the argument of the preceding case, that the principle was sufficiently obvious, as a principle of public law without any instructions; that relaxations were to be confined to the circumstances of the war, that had given rise to them, and that neutrals were not to presume they would be continued. On the 29th March 1803, the Court of Appeal pronounced the ship and cargo subject to condemnation; by the same judgment also were condemned the *Jerusha*, *Giles*, and the *Betsy*, *Kinsman*, cases, under similar circumstances, as to the time of capture, and reserved on the same question.

By these decisions, the *illegality* of voyages from the colonies of the enemy to neutral ports of *Europe*, not being the ports of the proprietors of the ship or cargo, nor a port of this kingdom, is fully established.

On the same principle, in the *Lucy*, *Glover*, 18th May 1802, a *Swedish* ship and cargo, taken 1799 on a voyage from a *French* colony, to a port of *America*, was pronounced subject to condemnation. In this case a reference had been made to the case of the *Sally*, *Hess*, and the *Hector*, *Smith*, *American* ships, taken on a voyage from a *French* (1) colony in the *West Indies*, to the neutral island of *St. Thomas*, and restored.

(1) St. Domingo.

(2) Sir William Grant.

Judgment was pronounced by the Master of the Rolls (2), to the following effect—"In the *Sally*, *Hess* (a). The Court thought they were going farther, than they should have been disposed to go

if

(2) Lords,  
Dec. 10, 1801.

(a) In the *Sally*, *Hess*, (2), an *American* ship taken on a voyage from *St. Domingo* to *St. Thomas* in 1794, it had been contended, that it was a case not within the instructions of 1794, by which the former and more extensive prohibition in the instructions of 1793, had been revoked, before the commencement of this transaction; that the instructions of 1794, directed only the bringing in "of ships bound to *Europe*;" that the produce in this instance, was not carried out of the *West Indies*; that there had been

if it had not been for the authority of the *Hector, Smith*, (a). (a) 5 July  
 Now we are required to go farther. In neither of those cases, 1800.  
 was the produce of the colonies carried out of the *West Indies*.  
 If an *American* vessel would not be permitted to trade from *St.*  
*Domingo* to *Sweden*, there can be no reason why the same  
 rule should not be applied to a *Swedish* vessel, trading between  
 the colony of the enemy and *America*.—Condemned.

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been a similar case in 1800, the *Hector, Smith*, taken on a voyage from a *French* colony to *St. Thomas*, in which the Court had decreed restitution.

On the part of the captor, it was contended, in conformity to the general argument, that no instructions were necessary to establish the illegality of a trade like the present, not permitted in time of peace; that if such a distinction as was here advanced, could be allowed, it would tend to establish a depot in the neutral island of *St. Thomas* or *St. Croix*, from whence a trade might be carried on to any part of the world, entirely frustrating the restraints, that had been pronounced still to attach, on a trade with the colonies of the enemy.

The judgment of the Court was pronounced by the Master of the Rolls, to the following effect:—It appears, that in the *Hector, Smith*, taken on a voyage similar to that in the present case, from a *French* colony to *St. Thomas*, restitution took place: and in other cases, it has been the intimation of persons composing this board, that such a voyage was not illegal. Under these precedents, the Court is disposed to think there must be restitution; whatever might be our own opinion, if the question were *res integra* before us.

## A.

(Translated from the Spanish.)

CONTRACT entered into between Messrs. Esteban Fernandès de Leon, Intendant of his Majesty's armies, and of the royal revenue arising within the province of Caracas, and the districts thereof, and William Robinson.

**T**HAT there shall be purchased, by Messrs. Robinson, Phillips, and Corser, forty thousand quintals *Carinos* tobacco, at present deposited in his Majesty's warehouses, (to wit) eight thousand quintals in *Porto Cabello*, two thousand in *La Guayra*, fourteen thousand in *Guayra*, and the remainder in *Barinas*; the whole of the first quality, &c. &c.

That the ten thousand quintals of tobacco, which are now in *Porto Cabello*, and *La Guayra*, shall be paid for (at rates specified); the whole to be free of export duty.

That twenty-four thousand quintals shall be exported from *Porto Cabello*, two thousand from *La Guayra*, and fourteen thousand from *Guayra*; the whole of which said tobacco are to be received in his Majesty's stores, in the aforesaid ports.

That the entire quantity of the said tobacco shall be exported within three years, commencing from the 1st of *October* next ensuing the date of these presents, in manner following: Four thousand quintals, within the term of six months; four thousand other quintals, within the term of other six months; six thousand quintals, within the term of other six months; six thousand quintals, within the term of other six months; and the remainder of the tobacco, within the third year. Provided always, nevertheless, and it is hereby understood, that the said Messrs. Robinson, Phillips, and Corser, shall be at liberty to export the whole quantity of the said tobacco, at any time within the said term of three years they may deem most convenient and expedient, they taking care to give due advice thereof to the intendency, in order to enable

the conveying of the said tobacco, to the port of *Cabello*, from whence the same is to be taken away, in conformity to the terms of the contract.

It shall be at the option and discretion of Messrs. *Phillips, Corser, and Robinson*, to export in preference, the tobacco deposited at *Porto Cabello*, and *La Guayra*, prior to that of *Guayana*, if more suitable and advantageous to their interest.

The amount of the tobacco shall be paid for in the following manner, to wit: One-fifth part in flour, and the remaining four-fifth parts in dry goods, or *Spanish* or *Portuguese* gold or silver specie, of half an ounce weight, and of lawful currency; and it is farther covenanted and agreed, That in the first year there shall not be imported more than four thousand barrels of flour in a payment for the said tobacco, proportioned to the consumption of the country, so that no loss may arise to, or be sustained by his Majesty's revenue, in the sale of the said article, by reason of too large a supply thereof; And it is farther covenanted and agreed, that in the importation of flour, specie, and dry goods so to be made in barter and exchange, for the shipment and exportation of the tobaccos aforesaid, it shall not be necessary exactly to adhere to the payment thereof, in fifth parts; but that the said purchaser shall be at liberty to pay for the said tobacco in dry goods or specie, as they may find most advantageous and convenient to their interest; provided, that in the issue of the present contract, the fifth parts correspond as hereby stipulated, so that in the event of an excess or deficiency of twenty or thirty thousand dollars, in the articles of flour or dry goods, or specie above stipulated, it is not to be considered as in violation or infringement of this contract.

That the flour shall be of superfine quality, and each barrel 8 *arrobas* weight, and be delivered at the rate of seventeen dollars per barrel, for all such as shall be imported in payment of said tobacco, within the term of nine months next ensuing the day of the date hereof, and sixteen dollars per barrel for all such as are imported subsequent to the said nine months, and during the term of the present contract; the whole of which flour shall be free from import duty.

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[A]

That

## APPENDIX.

That the dry goods to be given in payment for the said tobacco, shall be as follows: (to wit)

Platillas, britannicas, creas, *Rouen* checks and stripes, *Russie* sheeting, hessians, or cradas, *Osnaburg* bramantes, &c. for which the following prices are to be given, &c. And in case his Majesty's revenue officers shall refuse to receive any other goods than those stipulated for in this contract, in payment of the said tobacco, then, and in such event, the said Messrs. *Phillips, Corser, and Robinson*, shall be at liberty to export such rejected goods, free from any import duty, paying for the amount of the tobacco, in the articles and at the prices agreed for in this contract, or in specie; the importation of the whole of which shall be free from duty.

That each parcel of tobacco exported, shall be previously paid for, within the terms stipulated in the preceding articles; and the flour, and dry goods, that are to be given in payment for the twenty-four thousand quintals in *Porto Cabello, La Guayra, and Barinas*, are to be delivered in the custom-house of the port of *La Guayra*; and likewise the quantity of specie that may be furnished on account of the said tobacco, is to be delivered at said custom-house to the person or persons appointed for the reception thereof by the intendency of this place, and flour, dry goods, and specie, equivalent to the fourteen thousand quintals of tobacco deposited at *Guayra*, shall likewise be delivered in the port of *La Guayra*; provided always nevertheless, and it is hereby understood, that the said Messrs. *Phillips, Corser, and Robinson*, shall be at liberty, if more convenient to their interests, to deliver at *Guayra* the dry goods and specie, to the amount of the said fourteen thousand quintals of tobacco, to the Administrator General of tobacco, in the department of *Guayra*.

That all tobaccos raised in these provinces during the term of three years thereby stipulated, shall be deposited entirely to the purposes of this contract, or to the consumption of *Spain* and its colonies, but no sale whatever shall take place thereof to foreigners, the exclusive right being given to and vested in the said Messrs. *Phillips, Corser and Robinson*, during the term of this contract; and such exclusive privilege being granted to them for the purpose of giving a favourable issue to the said contract; in consideration

consideration of which exclusive privilege they bind themselves to purchase from five to ten thousand quintals more of tobacco of the crop of the said three years, at the rate of twenty dollars per quintal, and to pay for the same in conformity to the stipulation made and agreed to in regard to the forty thousand quintals.

In the event of a peace being concluded between *Spain* and *Great Britain* during the term of the present contract, it is hereby understood, that there shall be a deduction of ten *per cent.* from the prices of the flour and dry goods as stipulated; as likewise of other articles not stipulated in conformity to the seventh article, and which benefit shall be considered for the royal finances.

That the exportation of the tobacco and the importation of the goods to be given in *payment* thereof, may be made either in *Spanish* ships, or in vessels of neutral powers, in friendship and amity with *Spain*, and that the tobacco shall be delivered, equivalent to the amount of imports with as much facility as possible, not exceeding ten or fifteen days for the loading and unloading of vessels.

That when the ratification of the present contract takes place in conformity to the preceding article, it shall be considered firm, validated, and substantiated, notwithstanding the administration and direction of his Majesty's revenue, arising within these provinces, may change by the appointment of a successor to the present intendant, seeing that the present intendant entered into and concluded this contract, in virtue of powers vested in him by his Majesty, authorising him to export and dispose of the said tobacco, in such manner as his judgment and knowledge might direct. In testimony whereof, &c.

(Signed) ESTEVAN FERINA DE LEON,  
WM. D. ROBINSON, for himself,  
PHILLIPS and CORSE.

23d April, 1801.



## No. I.

(ARREST, 11<sup>me</sup> Janvier 1784.)

**V**U au Conseil d'Etat du Roi, sa Majesté y étant, les offres en renonciation faites par les concessionnaires intéressés & administrateurs de la compagnie de la *Guyane Française*, au privilege exclusif de la traite des Noirs à *Gorée* & le long des cotes d'*Afrique*, depuis le *Cap Vert*, jusqu'à la riviere de *Canamance*, qui leur avoit été accordé par Arrêt du 14 *Août* 1777, pour le terme & espace de quinze années, &c. Sa Majesté a concédé & concède, pour le tems & espace de neuf années consécutives, a compter du 1<sup>er</sup> *Juillet* prochain, aux Concessionnaires, Intéressés & administrateurs de la compagnie de la *Guyane Française*, le privilege exclusif de la traite de la *Gomme* seulement dans la riviere du *Sénégal* & dépendances, aux clauses, charges, & conditions, contenues dans le résultat du Conseil de sa Majesté, de ce jour ; supprime en conséquence le privilege exclusif de *Gorée* & dépendances accordé à la dite compagnie par Arrêt du 14 *Août* 1777 ; Veut & entend sa Majesté, qu' à l'exception de la traite de la *Gomme*, le commerce du *Sénégal*, puisse se faire librement par les armateurs des différens ports du royaume, ainsi que celui de *Gorée* & côtes d'*Afrique*, depuis le *Cap Vert* jusqu'à la riviere de *Serralionne*, & au delà, ordonne que tout le produit de la traite de la dite *Gomme* ne pourra être importé par la dite compagnie que dans les ports du Royaume, &c.

Fait sa Majesté défenses à tous ses autres sujets, de troubler la dite compagnie du *Sénégal* dans l'exercice du dit privilege exclusif de la *Gomme*, à peine de confiscation des objets traités en fraude, & de trois mille livres d'amende ; continuera au surplus d'être exécuté selon sa forme & teneur le résultat du Conseil de sa Majesté du 6<sup>th</sup> *Janvier* 1776, concernant les concessions & défrichemens de la *Guyane* ; sera le présent Arrêt imprimé, publié & affiché par tout où besoin sera, & seront sur icelui toutes lettres nécessaires expédiées.



## APPENDIX, No. II.

## No. II.

*LOI relative au commerce du Sénégal, 23 Janvier 1791.*  
 Le commerce du *Sénégal* est libre pour tous les *François*.

## No. III.

*DECRETS de la Convention Nationale de 26th & 29th Mars, 1793, la second de la Republique Française, relatifs aux relations commerciales des Etats-unis, avec les colonies Françaises.*

(Du 26th Mars 1793.)

1°. Admission en exemption de tous droits, des subsistances & autres objets d'approvisionnement, importés dans les ports des colonies par les vaisseaux des *Etats-unis*.

La Convention Nationale voulant prévenir par des dispositions précises, les difficultés que pourroient s'élever relativement à l'exécution de son décret du 19th *Fevrier* dernier, concernant les états-unis de l'*Amerique*, accorder de (a) nouvelles faveurs à cette nation alliée,

(a) This piece will serve, beyond its particular relation to the case in which it is cited, to supply farther general information respecting the jealousy and extreme caution with which *France* has always retained the strictest monopoly of trade with her own colonies. The purpose, for which those restrictions have been occasionally relaxed, in times of war, is so avowedly, "*pour approvisionner & vuider nos colonies*," that in the years 1756 and 1779, it was made a subject of political controversy, whether that purpose might best be effected by the expedient of admitting neutral merchants, or by means of *strong conveyers* appointed to protect their own navigation. The assistance of neutral ships was resorted to with great eagerness in 1756, though, according to the information of one of those writers, *not for the first time*. "*Ce ne'est pas la premiere fois qu'on a voulu recourir en France aux nations neutres, pour approvisionner & vuider nos colonies, & que ce secours a été reconnu insuffisant & ruineux.* Mr. *Pontchartrain* (a), *était* Ministre de la Marine, crut qu'il seroit bon d'admettre d'abord Colonies les nations amies ; mais les premiers vaisseaux qui furent expédiés, ayant été pris, le Ministre revint tout de suite au seul "*expédient*"

(a) *Circiter*  
*A. D. 1705.*

alliée, & la traiter dans ses relations commerciales avec les colonies *Françoises*, de la même manière que les bâtimens de la République, décrète ce qui suit.

1st. A compter de jour de la publication du présent décret dans les colonies *Françoises* d'*Amerique*, les navires des Etats-unis; du port de soixante tonneaux au moins, uniquement chargés de farines & subsistances, ainsi que des objets d'*approvisionnement* énoncés dans l'article 2. de l'arrêt du 30 Août 1784, comme encore de lard, beurre, saumons salés & chandelles, seront admis dans les ports desdites colonies, en exemption de tous droits. La même exemption aura lieu pour les bâtimens *Francois* chargés des mêmes espèces, venant de l'étranger.

2d. Les capitaines des bâtimens des Etats-unis, qui, ayant porté dans les colonies *Françoises* d'*Amerique* les objets compris dans l'article ci-dessus, voudront faire leur retour dans le territoire desdits Etats, pourront charger dans lesdites colonies, indépendamment des sirops, rhums, taffias, & des marchandises de *France*, une quantité de café équivalente au cinquantième du tonnage de chaque navire, ainsi qu'une quantité de sucre équivalente au dixième du tonnage, en se conformant aux articles suivans.

3d. Tout capitaine de navire *Américain*, qui voudra faire des retours dans les Etats-unis, en café & sucre des colonies *Françoises*, devra justifier que son bâtiment y est entré aux deux tiers au moins de sa charge, suivant l'article premier. A cet effet, il sera tenu de remettre dans les 24 heures de son arrivée, au bureau des douanes du lieu du débarquement, un certificat des agens de la

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"*expédient vraiment efficace.* Il traça un plan de protection, pour la "navigation *Françoise* si excellent, que quoique nos fussions en "guerre avec l'*Angleterre* & la *Hollande* à la fois, les primes ne passèrent pas 20 per cent. d'entrée ou de sortie de *St. Domingue* & "de la *Martinique*, & 15 à 22 pour cent. pour aller à *Quebec*." From the immediate failure of this first attempt it will appear, that the relaxation was considered, on its first introduction in the beginning of the last century, as an *expédient* of war, which neutral nations ought not to aid, and which this country was under no obligation from the law of nations to tolerate; notwithstanding the advantages that might accrue to the neutral merchant, as well as to the enemy from an admission into that lucrative trade. — *Considérations sur l'admission des navires neutres aux colonies Françaises de l'Amerique en tems de guerre.* — Page 13. — Printed in 1779.

Marine, qui constate la jauge de son bâtiment, & le tonnage effectif de son chargement.

Les préposés des dites douanes s'assureront que l'exportation de sucres & cafés n'excède pas les proportions fixées par l'article 2d du présent décret.

4th. Les capitaines des bâtimens des Etats-unis d'*Amérique* ne payeront à la sortie des Iles, ainsi que ceux de la République, qu'un droit de 5 livres par quintal d'indigo, 10 livres par millier de coton, 5 livres par millier de café, 5 livres par millier de sucre tête & terré, and 50 sous par millier de sucre brut. Toutes autres marchandises seront exemptes des droits à la sortie des dites colonies.

5th. Les sucres & cafés qui seront chargés, payeront dans les bureaux des douanes qui sont dans les colonies, où seront établis, en sus des droits ci-dessus fixés, ceux imposés par la loi du 19 Mars 1791, sur les sucres & cafés importés des dites colonies en France, & conformément à la même loi.

6th. Les capitaines des bâtimens des Etats-unis qui vaudront charger des marchandises dans les dites colonies pour les ports de France, fourniront au bureau des douanes du lieu du départ, les soumissions exigées des armateurs des bâtimens François, par l'article 2d de la loi du 10 Juillet 1791, pour assurer le déchargement de ces marchandises dans les ports de la République.

7th. Les bâtimens des nations avec lesquelles la République Française n'est point en guerre, pourront porter dans les colonies Françaises d'*Amérique* tous les objets désignés par le présent décret. Ils pourront aussi rapporter dans les ports de la République seulement, toutes les denrées des dites colonies aux conditions énoncées dans le dit décret, ainsi que dans celui du 19 Février.

#### No. IV.

*Du 29th du même Mois.*

*ADMISSION à la traite de la Gomme dans le Sénégal, des bâtimens Américains & de ceux des nations avec lesquelles la République Française n'est pas en guerre.*

La Convention Nationale voulant continuer à prouver aux alliés du peuple François, ainsi qu'aux nations amies de sa liberté, qu'elle désire les appeler aux mêmes avantages que sa sollicitude

aura toujours pour objet de procurer au commerce de la République, décrète ce qui suit :

Les bâtimens des Etats-unis de l'*Amérique*, ceux des nations avec lesquelles la République *Françoise* n'est point en guerre, qui seront armés *dans les ports & pour compte des négocians François*, seront admis à la traite de la *Gomme du Sénégal*. Ils jouiront pour leurs approvisionnemens & leurs retours en *France* des mêmes faveurs que les bâtimens de la République, à la charges de fournir au bureau des douanes du lieu du départ, les soumissions exigées des armateurs des bâtimens *François*, pour assurer leur déchargement dans les ports de la République.

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No. V.

*ARRETE* relatif aux bâtimens admis à faire le commerce dans la Colonie *Française* du *Sénégal*, du 25 *Frimiaire* an X. de la République *Française* une et indivisible.

Les Consuls de la République, sur le rapport du Ministre de la Marine : le conseil d'état entendu, arrêtent :

1st. A compter de jour de la publication du présent arrête à l'*Ile Saint Louis* au *Sénégal*, les bâtimens *François* seront seuls admis à faire le commerce, dans toutes les parties de la colonie *Française* du *Sénégal*.

2d. Les bâtimens neutres qui se trouveront en chargement au moment de l'arrivée de l'amâté, pourront l'achever, et il leur sera accordé, à cet effet, un délai de deux décades.

3d. Les Ministres de la Marine et de l'intérieur sont chargés, chacun en ce qui le concerne, de l'exécution du présent arrêter qui sera inséré au bulletin de lois.



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(a) In the *Carlotta*, Dec. 13, 1803, The question arose, Whether the principle on which salvage was given, on recapture of neutral property out of the hands of the enemy, during the late war, should be continued as a general rule, applicable to the present war. The Court, adverted to the particular considerations on which the principle had been adopted, and expressed a disposition not to continue the rule unless the same cause should be continued, in the violent and unjustifiable proceedings of the *French* cruisers, and Courts of Prize. The rule laid down in this decision was, that salvage should not be due, generally, on recapture of neutral property out of the hands of the enemy; nor unless it could be shown from some *edict*, or recognised practice, that such property would have become subject to condemnation in the Prize Court of the Enemy Captor.

*Transport* —

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